CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 268

STERLING P. HARRIS, ADMINISTRATOR OF THE ESTATE OF ANNA L. HARRIS, DECEASED, DEBTOR, PETITIONER,

vs.

ZION SAVINGS BANK AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

United States Circuit Court of Appeals

TENTH CIRCUIT

No. 2461.

STERLING P. HARRIS, as Administrator of the Estate of Anna L. Harris, deceased, APPELLANT,

vs.

ZION SAVINGS BANK AND TRUST COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

FILED DECEMBER 26, 1941.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 2461.

STERLING P. HARRIS, as Administrator of the Estate of Anna L. Harris, deceased, APPELLANT,

vs.

ZION SAVINGS BANK AND TRUST COMPANY, APPELLEE.

Statement of Points.

Comes now the appellant above named and makes the following statement of points upon which he intends to rely on the appeal of the above entitled matter, to-wit:

1. The court erred in vacating and setting aside the order of the said court reviving the said proceeding upon the petition of the administrator of Anna L. Harris, deceased.

2. The court erred in making an order directing that the *Admended* Petition of the said administrator for relief under subsection (s) of Section 75 of the Bankruptcy Act be denied.

3. The court erred in refusing to continue jurisdiction of the said court over the property of the deceased and in making an order dismissing the said proceeding in disregard of Section 8 of the Bankruptcy Act.

4. The court erred in holding that the jurisdiction of the Federal Court in said cause was dependent upon the statutes and rulings of the Supreme Court of the State of Utah and upon authority of the probate court to make an order authorizing the administrator to continue the said proceedings and further that the right of the said administrator to continue the proceedings pending at the time of the death of the said deceased was not absolute and unconditional.

Record Necessary for Consideration of Foregoing Points.

The said appellant believes that the entire record on appeal is necessary for the consideration of the points upon which he intends to rely, as hereinabove set forth.

Dated this 26th day of December, 1941.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Appellant.

Service of a copy of the foregoing Statement of Points and Designation of Record on appeal is accepted this 26th day of December, 1941.

THOMAS & THOMAS,
Attorney for Zion Savings Bank and Trust Company.

Filed December 29, 1941. Robert B. Cartwright, Clerk.

Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the March Term, 1942, of said Court, before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

Be It Remembered that heretofore, to-wit: On the 26th day of December, 1941, a transcript of the record pursuant to a notice of appeal, filed in the District Court of the United States for the District of Utah, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Sterling P. Harris, as Administrator of the Estate of Anna L. Harris, deceased, was appellant, and Zion's Savings Bank and Trust Company was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, is in the words and figures following, to-wit:

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE TILLMAN D. JOHNSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, PRESIDING IN THE FOLLOWING-ENTITLED CAUSE:

In the Matter of

STERLING P. HARRIS, as Administrator of the Estate of Anna L. Harris, deceased, DEBTOR AND APPELLANT.

No. 14824

Record on Appeal.

1 Comes now W. B. Wilson, Clerk of the above entitled Court, pursuant to the notice of appeal filed herein and the designation of record, and makes up for transmittal to the Clerk of the United States Circuit Court of Appeals of the Tenth Circuit the record on appeal as follows:

1. The petition of Anna L. Harris in usual form filed after approval December 20, 1937, with Schedules A and B attached.

Schedule A: Total Liabilities $8430.00.

Schedule B: Total Assets $32,500.00.

2. Meeting of creditors held before W. Douglas Allen, Conciliation Commissioner, February 10, 1938, and debtor made offer of composition and extension February 21, 1938.

3. Order abating proceeding:

The petition of Zion's Savings Bank and Trust Company for leave to foreclose mortgages having come on for further hearing, whereas it appears that said debtor, Anna L. Harris, has died since these proceedings were commenced.

Now, therefore, on motion of H. P. Thomas, one of counsel

for said petitioner, and good cause appearing, it is hereby ordered, adjudged and decreed that this cause do now abate.

Done in open court this 16th day of January, 1939.

TILLMAN D. JOHNSON, Judge.

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4. Petition for order reviving proceedings:

The petition of Sterling P. Harris respectfully shows to the court:

That the above named debtor died on or about the 23rd day of November; that by reason of the death of said debtor, the said proceeding was abated. Thereafter upon petition, the District Court of Salt Lake County, State of Utah made and entered an order appointing your petitioner administrator of the estate of the said deceased and your petitioner duly qualified and is now the duly qualified and acting administrator of said estate as is evidenced by a certified copy of said letters of administration attached hereto and filed herewith; that heretofore your petitioner, upon notice, applied to the District Court for Salt Lake County, State of Utah, for an order authorizing him to file a petition herein for the revival and reinstatement of said proceeding, a copy of the said order is attached hereto and made a part of this petition.

Your petitioner further shows to the court that after the death of the said deceased, Zion's Savings Bank and Trust Company, a creditor secured by mortgage, instituted a proceeding for the foreclosure of a mortgage upon the real estate scheduled herein and such proceedings have been had in said matter; that a decree of foreclosure was entered, an order of sale issued and a sale of said property made by the sheriff of Salt Lake County, State of Utah and the period of redemption in said estate is about to expire.

Wherefore, your petitioner prays for an order of this court reviving and reinstating said proceeding under the terms of Section 75 of the said Bankruptcy Act.

(Duly verified Feb. 9, 1940.)

Filed February 13, 1940.

STERLING P. HARRIS.

Order of State Probate Court authorizing administrator to apply to United States Court, attached to Petition for revival:

This cause came on for hearing upon the 10th day of February, 1940, on the petition of Sterling P. Harris, administrator of the estate of Anna L. Harris, deceased, praying for the relief hereinafter provided; notice of said petition and hearing having been previously served upon Zion's Savings Bank and Trust Company, a corporation; the administrator being represented by his attorney, E. J. Skeen and said bank by its attorneys, Thomas and Thomas; and the court having heard said petition and the arguments of counsel and it appearing and the court finds that there was pending in the United States District Court, District of Utah in February, 1938, a proceedings by and on behalf of said Anna L. Harris as debtor under and pursuant to Section 75 of the Bankruptcy Laws of the United States for relief of debtors, which upon the death of said deceased was thereupon abated by said United States Court in January, 1939; that on March 22, 1939, said administrator was appointed herein and thereafter said bank commenced suit in this court against said administrator to foreclose a mortgage upon farm lands in Salt Lake County, Utah, of said deceased joining others therein as defendants who claimed liens thereon and obtained a judgment of foreclosure July 17, 1939, and a certificate of sale to said lands at sheriff's sale August 15, 1939, for $5417.46, and the period of redemption from said sale will expire by the laws of the
3 State of Utah on February 15, 1940, and no redemption has been made and said proceedings in said United States Court have not been revived,

Now therefore, it is hereby ordered that said petition be granted and said administrator authorized to apply to said United States District Court for an order reviving and reinstating the said debtor relief proceedings, or instituting new proceeding in said court as advised.

And it is further ordered that said bank may on appeal herefrom to the Supreme Court of the State of Utah, stay the execution and enforcement of this order by giving bond as provided by law for such stay in the sum of $500.00 to the effect that it will pay, in the event this order is

sustained on appeal, all damages which said administrator may sustain by reason of the order having been stayed pending appeal and the administrator not having been allowed to make said application to said United States Court.

Done in open court at Salt Lake City, Utah, this 13th day of February, 1940.

P. C. EVANS, Judge.

And to the Petition for Revival was likewise attached a copy of Letters of Administration issued to Sterling P. Harris as follows:

Sterling P. Harris is hereby appointed administrator of the estate of Anna L. Harris, deceased.

By order of the court.

Witness William B. Korth, Clerk of said Court, with the seal thereof affixed this 30th day of March, A. D. 1939.

WILLIAM B. KORTH, Clerk.
By PARKER B. CADY, Deputy Clerk.

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5. Order Reviving proceedings:

It having been made to appear to the court from the verified petition of Sterling P. Harris that the above named debtor died on or about the 23rd day of November, 1938, and that the District Court for Salt Lake County, State of Utah, upon petition made and entered an order appointing Sterling P. Harris administrator of the estate of said deceased and letters of administration were issued to him, a copy of which has been filed in the office of the clerk of this court, and

It further appearing that the said District Court made and entered an order authorizing the said administrator to apply to this court for an order continuing the above entitled proceeding in this court, that Zion's Savings Bank and Trust Company filed Notice of Appeal from said order and executed and delivered a stay bond on said appeal and
4 good cause appearing therefor:

It is ordered that the above entitled proceeding be continued by Sterling P. Harris, as administrator of the estate of Anna L. Harris, deceased.

Dated this 15th day of February, 1940.

TILLMAN D. JOHNSON, Judge.

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6. Answer of Zion's Savings Bank and Trust Company to Petition of Sterling P. Harris.

Comes now Zion's Savings Bank and Trust Company, a corporation, and appearing specially for the purpose of having stricken and annulled the purported petition and order hereinafter mentioned, and not generally answers to the petition of Sterling P. Harris filed herein February 13, 1940, praying the court to revive and reinstate these proceedings and for answer thereto alleges:

1. Admits the allegations of said petition, except it denies there is attached thereto any copy of petitioner's letters of administration or any copy of an order of said State Court authorizing said administrator to petition this court herein to revive these proceedings; and alleges that said last mentioned order was stayed by its terms by appeal to the Supreme Court of Utah as hereinafter alleged:

Further, said bank alleges:

2. That these proceedings were instituted in the month of January, 1938, by Anna L. Harris, also known as Annie L. Harris, as debtor, pursuant to Section 75 of the Bankruptcy Act of the United States for the relief of debtors; that said debtor thereafter died and in January, 1940, an order was given and made herein that these proceedings should and thereby did abate and the same have not been revived.

3. That said Sterling P. Harris thereafter became and was appointed administrator of the estate of said deceased debtor by order of the District Court, Salt Lake County, Utah, Probate Division, given and made the 22nd day of March, 1939; that no application to revive the proceedings herein was made until the 10th day of February, 1940, when said administrator petitioned said Probate Court for

authority in that behalf, and on the 13th day of February, 1940, an order was given and made by said Probate Court granting said petition and authorizing the administrator to apply to this court for an order reviving these proceedings or to institute new proceedings in this court as advised, but said order expressly provides therein that said bank might on appeal therefrom to the Supreme Court of Utah, stay the execution and enforcement thereof by giving bond on appeal in the sum of $500.00 for such stay.

4. That on said 13th day of February, 1940, and immediately upon the entry of said order and by authority thereof, said Bank at once did give notice of appeal and did appeal to said Supreme Court and also thereupon
4 at once did give bond for the stay of said order as therein provided and the same thereupon was and now is thereby stayed and the administrator is wholly without any order or authority of said Probate Court to apply to or petition this court. That the order of the Probate Court aforesaid is hereto attached, maked Exhibit "A", hereby referred to and made a part hereof. (Same as attached to petition of administrator to revive proceedings.)

5. That notwithstanding said order provides the same shall be stayed by the appeal and bond aforesaid, but in disregard and in violation thereof, and after the same had been and was stayed, said administrator thereafter and later in said day, the 13th day of February, 1940, aforesaid, filed said petition herein and petitioned this court for a revivor of these proceedings as aforesaid, and on the 15th day of February, 1940, in further violation and disregard of said order, procured a purported order to be given and made by this court herein purporting to authorize said administrator as such to continue and revive these proceedings on behalf of the estate of said deceased. That a copy of said last-mentioned order is hereto attached, marked Exhibit "B", hereby referred to and made a part hereof. (Same as Order, Paragraph 5).

6. That by reason of the premises said administrator was and is without any order or authority to petition this court for relief, and without authority to make and file said petition and the same is wholly unauthorized, null and void, and this court is without jurisdiction of the subject matter

thereof and without jurisdiction over said administrator, and without jurisdiction to make and enter the purported order thereon aforesaid, and the same is null and void, and said petition and order should be annulled and held for naught and stricken out.

Wherefore, having answered, said bank respectfully prays that said petition and order be annulled and held for naught and stricken out.

H. P. THOMAS, Attorney for
Zion's Savings Bank and
Trust Company.

(Duly verified.)
Filed March 14, 1940.

Attached to said answer was notice that order of the said court was stayed on appeal by Zion's Savings Bank & Trust Company, giving bond and said cause was then in the Supreme Court of the State of Utah.

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7. On September 18, 1940, Sterling P. Harris, as administrator, deposited with the Clerk of the District Court, an amended petition for relief under subsection (s) of Section 75 of the Bankruptcy Act, said petition was marked: "received Sept. 18, 1940, at 10:30 A. M. V. P. Ahlstrom, Deputy." Said Amended Petition is as follows:

6 The petition of Sterling P. Harris respectfully shows to the Court:

That heretofore P. Harris filed her petition herein praying for relief under Section 75 of the Bankruptcy Law as amended March 3, 1933, and the amendments thereto; that said matter was referred to the Honorable W. Douglas Allen, Conciliation Commissioner for Salt Lake County, State of Utah; that said Conciliation Commissioner caused meetings of creditors to be held, as provided by law, and said debtor, during the course of said proceedings made a bona fide offer of composition and extension to her creditors and conducted negotiations for the composition and settlement of her debts; that said negotiations were unsuccessful and said petitioner failed to obtain the acceptance of the majority in number and amount of her creditors whose claims are affected by a composition and extension proposal.

That said debtor died on the 23rd day of November, 1938, and your petitioner is the duly appointed, qualified and acting administrator of her estate.

Your petitioner feels aggrieved by reason thereof and on behalf of said debtor is desirous of securing the advantages and benefits of subsection (s) of the said Section 75 as amended by the Act of August 28, 1935; that your petitioner has paid all costs incurred herein and has at all times complied with the orders of the court and the Conciliation Commissioner.

Wherefore, your petitioner prays that said estate be adjudged a bankrupt and that it be given the advantages of the said subsection (s) of the said Section 75 of the Bankruptcy Act; that its property be appraised; that its exemptions be set aside; that rental be fixed; that all proceedings against it be stayed and that your petitioner be continued in possession of all the property of said estate under the supervision and the control of the court.

STERLING P. HARRIS, Petitioner.

(Duly verified September 17, 1940.)

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8. Order that petition be not filed:

It appearing that from the opinion of the Supreme Court of the State of Utah in the case of Zions Bank and Trust Company, appellant, vs. Sterling P. Harris, as Administrator of the Estate of Anna L. Harris, deceased, respondent, that the administrator is without authority under the laws of the State of Utah to proceed in bankruptcy.

It is ordered that the amended petition under the Act of August 28, 1935, this day presented by said administrator be not filed at this time, and

It is hereby ordered that Sterling P. Harris, as administrator, show cause on Saturday, the 28th day of September, 1940, why said petition heretofore filed under Section 75 of the Bankruptcy Act should not be dismissed.

Dated this 18th day of September, 1940.

TILLMAN D. JOHNSON, Judge.

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7 9. Amended Motion to Strike:

Comes now Zion's Savings Bank and Trust Company, a corporation, and moves the court as follows:

1. To strike the petition of Sterling P. Harris, administrator of Anna L. Harris, deceased, praying to revive and reinstate these proceedings herein; said petition having been filed February 13, 1940.

2. To strike the amended petition of said administrator praying to be adjudged a bankrupt and for other relief pursuant to Subsection "s" of Section 75 of the Bankruptcy Act; said amended petition having been filed September 18, 1940.

3. To dismiss and terminate these proceedings.

All upon the grounds (1) that each of said petitions was filed without any order or authorization in that behalf of the state probate court, the District Court of Salt Lake County, Utah, which appointed said administrator and wherein the estate of said deceased was and is pending, and (2) that said administrator is and at all times was without right, power or authority under the laws of the State of Utah to file said petitions or otherwise enter into bankruptcy, and said petitions and each of them were and are wholly void.

This motion is made and based upon the files and records herein and the amended affidavit of H. P. Thomas on behalf of said bank herewith served and filed in support hereof.

H. P. Thomas & D. H. Thomas,
Attorneys for Zion's Savings Bank and Trust Company.

Filed August 29, 1941.

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10. Amended Affidavit Supporting Motion of Zion's Savings Bank and Trust Company:

H. P. Thomas, being first duly sworn, on oath deposes and says that he is one of counsel for Zion's Savings Bank and Trust Company, a corporation, and makes this affidavit in support of the amended motion of said bank (1) to strike the petition of Sterling P. Harris, administrator of

Anna L. Harris, deceased, praying for an order reviving and reinstating these proceedings herein, (2) to strike the amended petition of said administrator filed herein September 18, 1940, praying relief under Subsection "s" of Section 75 of the Bankruptcy Act, and (3) to dismiss and terminate these proceedings.

1. That said Anna L. Harris in her lifetime on December 18, 1937, commenced these proceedings and filed herein her petition for relief as a farmer-debtor under Section 75 of the Bankruptcy Act; that she thereafter died November 23, 1938, and these proceedings were thereupon abated by order of this court made and entered herein January 16, 1939.

8 2. Thereafter, March 22, 1939, said Sterling P. Harris was duly appointed and qualified as administrator of the estate of said Anna L. Harris, deceased, by order of the district court of Salt Lake County, Utah, Probate Division.

3. That thereafter said bank commenced action against said administrator in said state court to foreclose a mortgage on real property of said deceased; that it obtained a judgment and decree of foreclosure therein July 17, 1939, and became the purchaser at sheriff's sale and received the sheriff's certificate of sale to said property August 15, 1939, for $5417.46, subject to any redemption thereof within six months under and pursuant to the state law of Utah; that said period of redemption expired February 15, 1940, and no redemption having been made, the bank's title thereupon became absolute and it received a sheriff's deed to said property evidencing such title.

4. That two days before the period of redemption expired by state law as aforesaid, said administrator on February 13, 1941, obtained an order of said state probate court purporting to authorize him as such administrator to revive and reinstate these debtor proceedings herein or institute new ones as advised, which order further provided that the bank might stay the same and the execution and enforcement thereof on appeal to the State Supreme Court of Utah by giving bond as therein provided.

5. That on said 13th day of February, 1940, immediately

upon the entry of said order and by authority thereof and of the state law in such cases made and provided, said bank at once duly gave and filed notice of appeal and appealed to said State Supreme Court and also thereupon at once gave proper bond for the stay of said order as therein provided and as provided by law, and the same and the execution and enforcement thereof thereby became and was stayed and said order was wholly without force or effect whatever.

6. That notwithstanding said order was immediately and forthwith stayed on appeal as aforesaid, said administrator later in said day and after the same had been stayed and rendered of no legal force or effect, filed herein his petition aforesaid to revive and reinstate these proceedings. That on said appeal by said bank to said State Supreme Court the order of the State Probate Court aforesaid was duly reversed, annulled and set aside September 13, 1940 (In re Harris' Estate, Zion's Savings Bank and Trust Company vs. Harris, 105 P. (2d) 461. Certiorari granted, Harris vs. Zion's Savings Bank and Trust Company, 61 S. Ct. 611; writ of certiorari dismissed, 61 S. Ct. 840). That thereafter in pursuance of said reversal said probate court on the 25th day of August, 1941, duly made and entered its order annulling, vacating and setting aside and adjudging to be void and of no force or effect whatever its said order of February 13, 1940, purporting to authorize said administrator to proceed in said United States court.

7. That meanwhile said administrator filed herein September 18, 1940, his purported amended petition praying for relief and to be adjudicated a bankrupt under
9 Subsection "S" of Section 75 of the Bankruptcy Act aforesaid.

8. That said probate court wherein he was appointed never authorized, and never made any order authorizing, said administrator to file herein said petition to revive or reinstate these proceedings, or to file herein said amended petition under subsection "s" of Section 75 of the Bankruptcy Act, but both petitions were made and filed by said administrator without authorization of said probate court as required by General Order 50 (9) of the General Orders of the Supreme Court of the United States, and without right or authority under the laws of the State of Utah in re-

gard to administrators and executors, and were and are void and of no force or effect whatever and should be stricken out and these proceedings dismissed and terminated.

H. P. THOMAS.

Filed August 29, 1941.

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11. Findings of Fact and Conclusions of Law for Order Dismissing Administrator's Petitions:

This cause came on for hearing upon the petition of Sterling P. Harris, administrator of Anna L. Harris, deceased debtor, filed February 13, 1940, praying to revive the proceedings which were pending herein under Section 75 of the Bankruptcy Act upon the death of said debtor; upon the order of this court to show cause why said petition should not be dismissed; upon the petition of said administrator presented to the clerk of this court September 18, 1940, praying that said estate be adjudged bankrupt and allowed the advantages of subsection "s" of said Section 75, and also upon the amended motion of Zion's Savings Bank and Trust Company to strike said petitions and dismiss; J. D. Skeen, Esq. appearing for said administrator and H. P. Thomas, Esq. for said bank, and the said cause was heard and argued by counsel for the debtor and said bank and duly considered by the court, and the court being fully advised makes the following:

Finding of Fact.

1. That said Anna L. Harris in her lifetime commenced these proceedings on December 18, 1937, by filing her petition for relief as a farmer-debtor under said Section 75; that she died thereafter November 23, 1938, without effecting a composition or extension herein or amending her petition or petitioning the court for relief under subsection "s" of Section 75; that by order of this court these proceedings were then abated January 16, 1939, and on March 30, 1939, said administrator was appointed and qualified as such by the appointment of the District Court, Probate Division, Salt Lake County, Utah, made on said day.

2. That said bank thereafter commenced suit in said state court against said administrator to foreclose a mort-

gage on real estate of said deceased debtor and ob-
10 tained a judgment of foreclosure therein July 17, 1939; received the sheriff's certificate of sale of said property on foreclosure August 15, 1939, for $5417.46, subject to redemption within six months pursuant to the state law of Utah, and no redemption being made within said time, thereafter received a sheriff's deed to said property.

3. That February 13, 1940, two days before said period of redemption expired by said state law, said administrator obtained an order of said probate court purporting to authorize him as the personal representative of said deceased debtor to revive these proceedings. That said order also provided that the execution and enforcement thereof might be stayed on appeal to the Utah Supreme Court by said bank appealing and giving bond as therein provided, pursuant to which on said day, February 13, 1940, and immediately upon the entry of said order, said bank appealed to said Supreme Court therefrom and gave bond to stay, and stayed, said order on appeal as therein and as by law provided.

4. That later in said day, said February 13, 1940, and after said order had been appealed and was stayed as aforesaid, the administrator filed herein his petition to revive these proceedings under said Section 75, and thereafter, February 15, 1940, this court made and entered its order herein ordering these proceedings to be continued by said administrator.

5. That September 13, 1940, the order of said probate court was, on appeal, duly reversed, annulled and set aside (In Re Harris' Estate, Zion's Savings Bank and Trust Company vs. Harris, 105 P. (2d) 461. Certiorari granted, Harris vs. Zion's Savings Bank and Trust Company, 61 S. Ct. 611; writ of certiorari dismissed, 61 S. Ct. 840.) Thereafter, August 25, 1941, pursuant to such reversal, said probate court duly entered its order annulling, vacating and setting aside the same and adjudging it to be void and of no force or effect whatever.

6. That September 18, 1940, said administrator presented to the clerk of this court to be filed his said amended petition praying to be adjudged bankrupt under and by subsection "s" of Section 75 and for the benefits and advantages there-

of, whereupon this court made and entered its order on said day ordering that said petition not be filed at said time, (and the same was not and has not been filed or ordered filed) and further ordering said administrator to show cause why his said petition to revive these proceedings filed February 13, 1940, as aforesaid should not be dismissed. That no order of said state probate court was ever made or entered authorizing, directing or permitting said administrator to present or file in this court his amended petition for relief under said subsection "s", but said amended petition was offered and presented to be filed herein without the order or authority of said probate court. That no order or authority of said probate court authorizing the administrator to petition or apply for relief or otherwise proceed herein was ever made, given or had except said order of February 13, 1940, purporting to authorize him to petition to revive these proceedings, which order was reversed and annulled on appeal as aforesaid, and the administrator is and at all times was wholly without the order or authority of said probate court to proceed herein whatever.

11 From the foregoing Findings of fact the court now makes the following:

Conclusions of Law.

1. That being without any order or authority of the State probate court so to do, said administrator was without right or authority to petition this court to reinstate and continue these proceedings under said Section 75 or to petition this court for relief under subsection "s" thereof. That by the state law of Utah as determined by the Supreme Court of said state in the matter of said Anna L. Harris, deceased, as aforesaid, the administrator is without power to petition and the probate court is without power or jurisdiction to authorize him to petition this court for relief, and this court was without power or jurisdiction to accept or receive his petition.

2. That therefore the order of this court given and made herein February 15, 1940, ordering these proceedings to be continued by said administrator should be vacated, annulled and set aside and held for naught, and the petition of said administrator theretofore filed herein February 13, 1940,

praying to revive and reinstate these proceedings under said Section 75 should be dismissed.

3. That the amended petition of said administrator praying that the estate of said deceased be adjudged bankrupt and for other relief pursuant to subsection "s" of said Section 75, which petition was presented to the clerk of this court by said administrator September 18, 1940, but not filed, was properly refused for filing and should not be received or filed herein.

4. That said amended motion of Zion's Savings Bank and Trust Company to strike the petition of said administrator praying to revive and reinstate these proceedings under said Section 75 and to strike the amended petition of said administrator aforesaid and to dismiss these proceedings should be denied.

Let the order of the court be made and entered accordingly.

Dated at Salt Lake City, Utah, this 30th day of September, 1941.

TILLMAN D. JOHNSON, Judge.

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12. Order Dismissing Administrator's Petitions:

This cause came on to be heard at this term and was argued by counsel for Sterling P. Harris, administrator of the estate of said Anna L. Harris, deceased debtor, and by counsel for Zion's Savings Bank and Trust Company, and now upon consideration thereof it is hereby ordered, adjudged and decreed:

1. That the order of this court given and made herein February 15, 1940, ordering these proceedings to be continued by said administrator be and is hereby vacated, annulled and set aside and held for naught, and the petition of said administrator theretofore filed herein February 13, 1940, praying to revive and reinstate these proceedings under Section 75 of the Bankruptcy Act be and is hereby dismissed.

12 2. That the amended petition of said administrator praying that the estate of said deceased be adjudged bankrupt and for other relief pursuant to subsection "s"

of Section 75 of the Bankruptcy Act, which petition was presented to the clerk of this court by said administrator September 18, 1940, but not filed, be and is hereby ordered not to be filed herein.

3. That the amended motion of Zion's Savings Bank and Trust Company to strike the petition of said administrator to revive and reinstate these proceedings under Section 75, also to strike said amended petition ordered not filed as above, and also to dismiss these proceedings, be and is hereby denied.

Dated at Salt Lake City, Utah, this 30th day of September, 1941.

TILLMAN D. JOHNSON, Judge.

13. Stipulation Regarding Order of Probate Court Denying Administrator Authority to Appeal Herein:

It is hereby stipulated by and between appellant Sterling P. Harris, as administrator of said deceased, and appellee Zion's Savings Bank and Trust Company as follows:

1. That after the entry of this court's Order Dismissing Administrator's petitions given and made September 30, 1941, said administrator on October 10, 1941, petitioned the District Court, Probate Division, Salt Lake County, Utah, for an order authorizing him to appeal from and prosecute proceedings herein to review said Order Dismissing Administrator's Petitions.

2. That said Zion's Savings Bank and Trust Company duly filed in said probate court its answer and protest to said petition setting forth haec verba therein said order of this court dismissing administrator's petitions and also the findings of fact and conclusions of law supporting the same and alleging in said answer that a previous order of said probate court (mentioned in said findings herein) made February 13, 1940, purporting to authorize the administrator as the representative of said deceased to revive these debtor proceedings herein, had been stayed on appeal by said bank and reversed and set aside by the Supreme Court of Utah, certiorari dismissed by the United States Supreme Court, and further alleging that such reversal was res judicata of

the administrator's application for authority to appeal herein and that the probate court was without power and jurisdiction to authorize the administrator to resort to the United States District Court to take or attempt proceedings in Bankruptcy under Section 75 of the Bankruptcy Act, including proceedings for appeal or review of said order of the bankruptcy court herein.

3. That upon the hearing of the petition and answer and protest aforesaid the probate court made and entered its order the 17th of October, 1941, ordering, adjudging and decreeing as follows:

A. That said administrator not be authorized or directed to appeal from or institute proceedings to review this
13 court's Order Dismissing Administrator's Petitions and that his application in that behalf be dismissed and denied.

B. That the judgment of the Supreme Court of Utah reversing and setting aside the order of said probate court purporting to authorize said administrator to revive these proceedings herein was res judicata in said probate court and cause.

Dated November 1, 1941.

J. D. SKEEN, E. J. SKEEN,
Attorneys for Sterling P. Harris, Administrator of Anna L. Harris, deceased.
H. P. AND D. H. THOMAS,
Attorneys for Zion's Savings Bank and Trust Company.

---

14. Notice of Appeal:

Notice is hereby given that Sterling P. Harris, administrator of the estate of Anna L. Harris, deceased, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the order of the above entitled court dated September 30, 1941, setting aside and vacating the order reviving the above entitled proceedings, denying the petition of the administrator of said estate to be adjudged a bankrupt, pursuant to the provisions of subsection (s) of

Section 75 of the Bankruptcy Act and refusing to permit the administrator of the said estate of Anna L. Harris, deceased, to pursue the proceedings pending at the time of the death of the said deceased for relief under Section 75 of the Bankruptcy Act. This appeal is taken on questions of law and fact.

Dated this 23rd day of October, 1941.

J. D. SKEEN, E. J. SKEEN,
Attorneys for Sterling P. Harris, Administrator.

[Appellant's statement of points relied on, filed in the district court, is identical with the statement which appears at page 1.]

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14 It is stipulated that the foregoing record on appeal, together with Notice of Appeal and Statement of Points may be certified and transmitted by the Clerk of the United States District Court for the District of Utah to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit and that the same shall constitute the record on appeal in said cause.

It is further stipulated that the appellee does not waive but expressly reserves the right to assert that this appeal is attempted by appellant administrator without authorization of the State probate court of his appointment and wherein the matter of the estate of said Anna L. Harris, deceased, is still pending.

Dated this 16th day of December, 1941.

J. D. SKEEN, E. J. SKEEN,
Attorneys for Appellant.

THOMAS & THOMAS,
Attorneys for Appellee.

Filed in United States District Court December 17, 1941.

Bond on appeal in the sum of $250.00 filed October 23, 1941.

Order Extending Time.

17 It having been made to appear to the satisfaction of the court that the above named debtor has filed Notice of Appeal of the above entitled cause, together with a bond on appeal as required by the rules of this court, and that he has designated the contents of the record on appeal and it appearing that further time is required to complete the record for filing in this case and for the docketing of said cause,

It is ordered that the time for filing the record on appeal and docketing the said action be, and it is hereby enlarged and extended up to and including the 27th day of December, 1941.

Dated this 13th day of November, 1941.

ORIE L. PHILLIPS,
Circuit Judge.

Filed in United States District Court November 15, 1941.

Certificate of Clerk.

United States of America, District of Utah, ss.

18 I, W. B. Wilson, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from 1 to 14, inclusive, is a true and correct copy of the original abstract of record on appeal as prepared and filed by the appellant on December 17, 1941, and that pages numbered from 15 to 17, inclusive, are true and correct copies of the original documents now remaining among the records of said Court in my office, in case numbered 14824, In the Matter of Sterling P. Harris as Administrator of the Estate of Anna L. Harris, deceased, Debtor.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Salt Lake City, Utah, this 24th day of December, 1941, and the 166th year of the Independence of the United States of America.

(Seal) W. B. WILSON, Clerk.

Filed December 26, 1941. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz.:

Order of Submission.

Ninth Day, March Term, Friday, April 17th, A. D. 1942. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, J. D. Skeen, Esquire, appearing for appellant, Hadlong P. Thomas, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Opinion.

[May 5, 1942.]

J. D. Skeen (E. J. Skeen was with him on the brief) for Appellant.

Hadlong P. Thomas (Thomas & Thomas and Daniel H. Thomas were with him on the brief) for Appellee.

Before Phillips, Huxman and Murrah, Circuit Judges.

Huxman, Circuit Judge, delivered the opinion of the court.

During her lifetime, Anna L. Harris filed a petition in the United States District Court for the State of Utah, praying relief under Section 75 of the Bankruptcy Act, subsections (a) to (r), inclusive. The matter was referred to a conciliation commissioner, an offer of composition and extension was made, but before it was either accepted or rejected, Anna L. Harris died. Thereupon the federal court entered an order abating the pending proceeding. Thereafter, Sterling P. Harris, appellant herein, having been appointed administrator of her estate, filed a petition for an order reviving the proceeding in the federal court. The petition had attached to it an order of the Probate Court authorizing the administrator to apply for a revival of the proceeding and also authorizing him to institute a new proceeding in the federal court under Section 75. Appellee, the Zion's Savings Bank and Trust Company, resisted the

petition in the Probate Court. It appealed to the Supreme Court of Utah from the order of the Probate Court granting authority to proceed in the Federal Court. After the revival of the proceedings in the Federal Court, the administrator filed an amended petition seeking relief under subsection (s) of Section 75 of the Act. The matters were kept in abeyance in the Federal Court pending a decision of the Supreme Court of Utah on the appeal. The Utah Supreme Court reversed the order of the Probate Court granting the administrator authority to proceed in the Federal Court. Application was made for a writ of certiorari to the Supreme Court of the United States. The writ was issued and the matter was set down for argument. After argument, the court dismissed the application for the writ. Harris, Administrator, v. Zion's Savings Bank & Trust Co., 313 U. S. 541.

Thereupon the Zion's Savings Bank and Trust Company filed an amended motion to strike the petition to revive and the amended petition to proceed under subsection (s). The motion was sustained and judgment was entered accordingly. The administrator has appealed.

The Supreme Court of Utah held that the Probate Court was a creature of the law and that the source of its power and the power of the administrator must be found in the probate code. It held that the administrator could not be authorized by the Probate Court to resort to the Federal Court to revive proceedings which were pending there under Section 75 at the time of decedent's death. In re Harris' estate, 99 Utah 464, 105 P. 2d 461.

Notwithstanding the holding of the Utah court, appellant contends that power of the administrator to maintain a rehabilitation proceeding under Section 75 (s) is conferred by that part of Subsection (r) which provide that the term "farmer" not only includes one who is primarily bona fide personally engaged in producing products of the soil, but also the "personal representatives of a deceased farmer." We doubt whether such a broad construction can be sustained. Federal courts have no probate jurisdiction. Power to administer estates resides entirely with the states. Probate courts and administrators are the creatures of state

law. They can exercise only such powers as are given to them by their creator. To hold that a federal law could endow an administrator with power denied him by his creator would in effect constitute an amendment of the state law which gave him birth.

It is argued that the proceeding was pending in the bankruptcy court at the time of the death of Mrs. Harris. That Section 8 of the General Bankruptcy Law provides that death of a bankrupt does not abate the proceeding nor divest a bankruptcy court of jurisdiction of the bankrupt's property. It is contended that if on the death of a bankrupt, jurisdiction continues in a general bankruptcy proceeding, there is no reason why it should not continue under the same conditions in a proceeding under Section 75. But there are many differences in the two proceedings. In a general bankruptcy, the object is to liquidate one's debts and secure a discharge therefrom. The bankrupt upon filing his petition surrenders his property. The title thereto passes to the trustee, and thereafter the bankrupt has no proprietary interest therein. 11 U. S. C. A. 110. Neither can he thereafter stop the proceedings and go hence with his property to do with as he pleases. The object sought in a proceeding under Section 75 is not primarily liquidation, but rehabilitation. It affords a breathing spell during which the farmer continues operations and attempts to get back on his feet. While under Subsection (n) he and his property are subject to the exclusive jurisdiction of the court upon the filing of a petition, he is not, however, divested of his ownership or control thereof. He may dismiss the proceedings the next day, or take no further steps, and use his property in any lawful manner he may wish. If he should die, his property descends to his heirs according to the laws of the state. It is doubtful if the rehabilitation feature of the Act can come into play in an estate upon the death of a distressed farmer. His opportunity for rehabilitation ends with his death. Title to his property, both personal and real, under Utah law vests immediately in the heirs. In re Harris' Estate, supra. Whether his heirs would be entitled to the benefits of the Act would depend, first, upon whether they were farmers within the meaning of the Act, and next, upon whether they were distressed. Suppose they desired

to pay the claim against the property and then possess it, could the administrator revive the pending proceedings and operate it under the provisions of the Act for three years?

But it is not necessary to the decision of this case that we explore and define the ultimate limits and meaning of this part of Subsection (s). Subsection 9 of General Order in Bankruptcy 50, promulgated by the Supreme Court, requires a personal representative of a deceased farmer desiring to proceed under Section 75 to attach to his petition, among other things, a copy of an order of the Probate Court authorizing him to file a petition. This requirement is mandatory. The bankruptcy court has no authority to entertain the personal representative's petition unless he attaches the authorization of the Probate Court empowering him to proceed. Lemm v Northern California Natl. Bank, 9 Cir., 93 F. 2d 709.

In the argument before this court, appellant took the position that Section 9 of General Order 50 was unconstitutional because it was in derogation of the plain provisions of that part of Subsection (s) which recognized a personal representative of a deceased farmer as entitled to the benefits of the Act. A Circuit Court of Appeals will not declare unconstitutional an order of the Supreme Court of the United States promulgated under express statutory authority of law. That must be done, if it all, by the Supreme Court. In re Bronx Ice Cream Co., 2 Cir., 66 F. 2d 620.

Furthermore, we feel that by Section 9 of General Order 50, the Supreme Court has construed Subsection (r) to mean that a personal representative of a deceased may come in and seek to effect a composition or extension of the debts of the deceased under the provisions of Section 75 when such power resides in him by virtue of the state law, and when he files with his petition an order of the Probate Court authorizing him to proceed.

The decision of the trial court is Affirmed.

Judgment.

Nineteenth Day, March Term, Tuesday, May 5th, A. D. 1942. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that Zion's Savings Bank and Trust Company, appellee, have and recover of and from Sterling P. Harris, as Administrator of the Estate of Anna L. Harris, deceased, appellant, its costs herein.

Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the transcript of the record from the District Court of the United States for the District of Utah, and full, true and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2461, wherein Sterling P. Harris, as Administrator of the Estate of Anna L. Harris, deceased, was appellant, and Zion's Savings Bank and Trust Company was appellee, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 2nd day of June, A. D. 1942.

(Seal, U. S. Circuit Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 268

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 30 1942
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 268

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased Debtor,

Petitioner,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. D. Skeen,
E. J. Skeen,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 268

STERLING P. HARRIS, AS ADMINISTRATOR OF THE ESTATE OF ANNA L. HARRIS, DECEASED DEBTOR,

Petitioner,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY.

PETITION FOR WRIT OF CERTIORARI.

The petition of Sterling P. Harris as administrator of the Estate of Anna L. Harris, deceased, respectfully shows to the court:

That on the 20th day of December, 1937, Anna L. Harris filed a petition in the United States District Court for the District of Utah praying for relief under Section 75 of the Bankruptcy Act. The said petition recited that she was a farmer within the purview of the Act and there was attached thereto, schedules A and B showing liabilities of $8430 and assets of an estimated value of $32,500. Said matter was referred to the Conciliation Commissioner for

Salt Lake County, who called and held a meeting of creditors. The debtor made an offer of composition and extension on the 21st day of February, 1938. She died on the 23rd day of November, 1938 and on March 30, 1939, letters of administration of the estate of the deceased debtor issued to Sterling P. Harris, the surviving husband, who is the petitioner herein.

On February 15, 1940 the administrator filed his petition in the District Court of the United States for the District of Utah, praying for an order reviving the proceedings under Section 75 of the Act. Attached to the petition was an order of the probate court authorizing the administrator to petition for the revival of the proceedings pending at the time of the death of Anna L. Harris or to institute new proceedings in the United States District Court as advised. On February 15, 1940, the District Court entered an order of revival. Zion's Savings Bank and Trust Company appealed from the order of the probate court to the Supreme Court of the State of Utah and served notice that it had given bond to stay the proceedings. On the 13th day of September, 1940, the Supreme Court of Utah reversed the District Court and set aside the order of the probate court authorizing the administrator to revive the Federal Court proceeding. The opinion of the Supreme Court of Utah is reported in 99 Utah 464, 105 P. (2d) 461.

On September 18, 1940, Sterling P. Harris deposited an Amended Petition in the office of the Clerk of the United States District Court, praying for relief under subsection (s) of Section 75 of the Bankruptcy Act. The petition was endorsed by the Clerk as received on that date.

The administrator applied to this Court for a writ of certiorari to the Supreme Court of Utah. The writ was granted, 312 U. S. 670, 85 L. ed. 1112; and after argument, was dismissed, 313 U. S. 541, 85 L. ed. 1509. In the order of dismissal this Court said:

"April 14, 1941. Per Curiam: Upon appeal from an order of the Probate Court of Salt Lake County, Utah, purporting to authorize an administrator of a deceased farmer to file a petition for relief under Section 75 of the Bankruptcy Act, 11 USCA, Section 203, the Supreme Court of Utah has held that under the Probate Code of the State the Probate Court had no power to make the order. The decision thus rests upon an adequate non-Federal ground, and as the Federal question, whether in such circumstances a District Court of the United States sitting in bankruptcy could entertain a petition of the personal representative of the deceased farmer under Section 75 of the Bankruptcy Act was not necessarily involved, the writ of certiorari is dismissed."

During the pendency of the appeal from the order of the probate court to the Supreme Court of Utah and the proceedings in this Court, all proceedings in the District Court of the United States were held in abeyance. On the 29th day of August, 1941, Zion's Savings Bank and Trust Company filed a motion to strike the petition for the revival of the proceedings filed by the administrator and to dismiss the proceeding upon the following grounds, to-wit:

(1) "That each of said petitions were filed without any order or authorization or in that behalf of the state probate court, the District Court of Salt Lake County, Utah, which appointed said administrator and wherein the estate of said deceased was and is pending; and (2) that said administrator is and at all times was without right, power or authority under the laws of the State of Utah to file said petitions or otherwise enter into bankruptcy, and said petitions and each of them were and are wholly void."

A hearing of said matter was had and the District Court made findings of fact, reciting the proceedings as hereinabove set out, from which it drew the following conclusions:

"1. That being without any order or authority of the State probate court so to do, said administrator was without right or authority to petition this court to reinstate and continue these proceedings under said Section 75 or to petition this court for relief under subsection "s" thereof. That by the state law of Utah as determined by the Supreme Court of said state in the matter of said Anna L. Harris, deceased, as aforesaid, the administrator is without power to petition and the probate court is without power or jurisdiction to authorize him to petition this court for relief, and this court was without power or jurisdiction to accept or receive his petition.

2. That therefore the order of this court given and made herein February 15, 1940, ordering these proceedings to be continued by said administrator should be vacated, annulled and set aside and held for naught, and the petition of said administrator theretofore filed herein February 13, 1940 praying to revive these proceedings under said Section 75 should be dismissed.

3. That the amended petition of said administrator praying that the estate of said deceased be adjudged bankrupt and for other relief pursuant to subsection "s" of said Section 75, which petition was presented to the clerk of this court by said administrator September 18, 1940, but not filed, was properly refused for filing and should not be received or filed herein.

4. That said amended motion of Zion's Savings Bank and Trust Company to strike the petition of said administrator praying to revive and reinstate these proceedings under said section 75 and to strike the amended petition of said administrator aforesaid and to dismiss these proceedings should be denied.

Let the order of the court be made and entered accordingly.

Dated at Salt Lake City, Utah, this 30th day of September, 1941.

Tillman D. Johnson, Judge."

On October 23, 1941 an appeal was taken from the District Court to the United States Circuit Court of Appeals for the Tenth Circuit. The record was completed, the case orally argued and on May 5, 1942, the Circuit Court of Appeals filed its opinion and decision affirming the judgment of the District Court. The opinion is published in 127 F. 2d 1012 (R. 22).

The questions presented by this application may be briefly stated as follows:

I.

Is the jurisdiction of the United States District Court to grant relief to the administrator of a deceased farmer under the provisions of Section 75 of the Bankruptcy Act, dependent upon the statutes of the State of Utah and the rulings of the Supreme Court of the State, granting authority to the probate court to order the administrator to make the application for such relief, or, stated negatively, can a state withhold or deny the right of an administrator to seek and receive the benefits given by Section 75 of the Bankruptcy Act?

II.

Is General Order 50-9 to be construed as restricting or limiting the rights conferred by Section 75, Subsection (r) of the Bankruptcy Act, or otherwise stated, should General Order 50-9 be construed to mean that the administrator must supply the order showing he is authorized to make the application only if he can procure it?

III.

Is Section 75 (r) to be given uniform application in all of the States of the United States, as provided by the Constitution, Article 1, Section 8, or is there a lack of uniformity in the application of the Act giving it effect only in

states in which administrators are authorized to make the application or in cases in which a probate court may see fit to make the order required by General Order 50-9, or does the United States law prevail in all cases and can the administrator in all cases, regardless of orders of the probate court, apply for and be given the relief authorized by Section 75 of the Act?

IV.

When the State Court appoints an administrator of an estate, may he not look to the Constitution and Statutes of the United States as the Supreme Law of the Land for authority to make application for relief under Section 75 of the Act?

V.

Is Section 8 of the General Bankruptcy Act, providing that "the death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner so far as possible, as though he had not died or become insane," applicable to proceedings under Section 75 of the Act?

The writ of certiorari should be granted for the following reasons:

1. The construction of Section 75 (r) by this court is of the utmost importance in the administration of the Act because, under the Constitution, the Act must be given uniform application, which it cannot be given if either the legislature or the courts of the various states are permitted to take from the administrator the rights granted.

2. Section 75, subsection (r) of the Act expressly includes in the definition of a farmer, "the personal representative of a deceased farmer", who, by other provisions of the Act, is given the absolute right to file the petition in the United

States Court and to permit the proceeding to be nullified by a probate court or by the Supreme Court of the state or by the legislature, would necessarily disregard the supremacy of the Constitution and laws of the United States.

3. The construction of General Order 50-9 in connection with Section 75 (r) by this Court is necessary as a guide to the lower courts in the administration of the law, inasmuch as the Circuit Court of Appeals took the position that it was without power to, in any respect, limit or restrict the application of General Order 50.

4. It is of the utmost importance that Section 8 of the Bankruptcy Act, providing that proceedings shall not abate by reason of the death or insanity of a bankrupt, should be construed by this Court in connection with Section 75 of the Act.

5. This question has been presented to and passed upon by various District and Circuit Courts of Appeal of the United States, which courts, as presently indicated, have arrived at different conclusions.

In re Buxton's Estate, 14 Fed. Supp. 616;
In re Reynolds Estate, 21 Fed. Supp. 369.

These cases hold there is no authority in the state statutes for the granting of an order to make application for relief under Section 75 in the Federal Courts. They are disapproved in

Hines v. *Farkas*, CCA 5th Circuit, decided January 22, 1940, 109 F. (2d) 289.

Chapman v. *Federal Land Bank of Louisville*, 117 F. (2d) 321, retained jurisdiction after the probate court had once made an order authorizing the filing of the petition. Neither of these cases is precisely in point because the

state court had not previously held the probate court to be without authority to authorize the filing.

A District Court in New York held in *re Morgan*, 15 Fed. Supp. 52, that a proceeding pending under Section 74 of the Bankruptcy Act, at the time of the death of the debtor was not abated by the death; that the Federal Court having previously had jurisdiction retained it. The Circuit Court of Appeals of the First Circuit in *Beniteze, et al.* v. *Anciani*, decided May 25, 1942 reported in 127 F. (2d) 121, supports our contention that section 8 of the General Bankruptcy Act applies to section 75.

The Circuit Court of Appeals in this case held specifically that General Order 50-9 controlled and it was not at liberty to consider the question as to whether the General Order is in conflict with the statute and further, that section 8 of the General Bankruptcy Act, providing that a proceeding in bankruptcy shall not abate by reason of the death of the bankrupt, has no application under Section 75 of the Act.

Sterling P. Harris, Administrator of the Estate of Anna L. Harris, deceased debtor, v. *Zion's Savings Bank and Trust Company*, decided May 5, 1942, 127 F. (2d) 1012 (R. 22).

WHEREFORE, petitioner prays that a writ of certiorari issue by this Court directing that all proceedings of the Circuit Court of Appeals be duly certified and that the judgments of the Circuit Court of Appeals and of the District Court be set aside and that said proceeding be reinstated and relief granted as by the statute provided.

Respectfully submitted,

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioner.

SUPPORTING BRIEF.

This Court is given authority by section 240 of the Judicial Code, 28, U. S. C. A., section 347, page 359 and by section 24A of the Bankruptcy Act, to issue the writ of certiorari in this case.

The writ should be granted because:

By section 75 of the Bankruptcy Act, a farmer may file a petition in the United States District Court and procure the benefits of the Act and upon the filing of the petition by 75 (n) the Federal Court is invested with exclusive jurisdiction over the farmer and his property. By subsection (r) the personal representative of a deceased farmer is a farmer within the purview of the Act. There is no reservation in the statute of any character. The right is conferred upon the personal representative as a farmer absolutely and unconditionally. He is required to produce no papers except the petition with schedules. It is elementary that a right granted by Congress may not be taken away by a State.

Kalb v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370, in this case the court said:

> "The states cannot, in the exercise of control over local laws and practice, vest State Courts with power to violate the supreme law of the land."

Hines v. *Lowery*, 305 U. S. 85; 83 Law Ed. 56.

The fact that the Federal Courts do not possess probate powers is beside the question. When the probate court, however, creates a farmer, to-wit: the personal representative of a deceased farmer, that farmer is vested in his representative capacity with all the rights given by the Federal Statute. The State may not create the entity which is instantly possessed of the Federal rights and at the same time take the rights away.

The confusion of the law resulting from different rulings of different courts of the United States and particularly with the direct holding of the Circuit Court of Appeals of the Tenth Circuit in this case has the effect of frittering away the rights so given. We have called attention to the cases in the petition filed herewith.

It will be observed by the petition that this proceeding was pending in the Federal Court at the time of the death. It is essentially a bankruptcy proceeding. There is no provision in Section 75 dealing directly with the situation resulting from the death or insanity of the debtor. By subsection (n) it is provided:

> "In proceeding under this section, except as otherwise provided herein, the jurisdiction and power of the court, the title, powers and duties of its officers, the duties of the farmer and the rights and liabilities of creditors, and of all other persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged, a bankrupt was filed with the Clerk of the Court or left with the Conciliation Commissioner for the purpose of forwarding the same to the clerk of the court."

No reference is made in the opinion of the Circuit Court of Appeals to this provision of the statute, but the court disposes of the claim that Section 8 of the Bankruptcy law controls with the simple suggestion that the purposes of Section 75 are different from those of the General Bankruptcy Act. Section 8 specifically provides that the proceeding shall not abate because of the death or insanity of the bankrupt. That has to do directly with the jurisdiction of the court. From the quotation from subsection (n) it will be observed that it also deals directly with the jurisdiction and powers of the court and that they are the same

as if an adjudication had been made in a voluntary bankruptcy proceeding. No good reason exists for holding that Section 8 does not control in this case. In the confused state of the law, the rights of farmers are different in Oklahoma, Illinois, Kentucky, Porto Rico, California, and Utah.

This situation is further complicated by the requirements of General Order 50-9, which, taken literally, would seem to impose the condition that the order of the probate court be attached at all events. Great deference is given to this General Order resulting in an interpretation having the effect of a modification of the statute.

As stated by the Circuit Court of Appeals of the Tenth Circuit in this case, it is not competent for a Circuit Court of Appeals to disregard it and hence, the debtor is deprived of the clear statutory right through a combination of the construction of General Order 50 and the ruling of a State court. Even the statute 75-b provides in so many words that this Court is authorized to make the general orders, "but any District Court of United States may, for good cause shown and in the interest of justice, permit any such general order to be waived." The Circuit Court of Appeals has not seen fit to give effect to these words.

It is respectfully submitted that a writ of certiorari should issue in this case in order that the law may be made definite and certain.

J. D. Skeen,
E. J. Skeen,
Attorneys for Petitioner.

(1429)

FILE COPY

Office - Supreme Court, U. S.
NOV 30
CHARLES ELMORE CROPLEY

No. 268

The Supreme Court of the United States

OCTOBER TERM, 1942.

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased,

Petitioner,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY,

Brief for Petitioner on the Merits

J. D. SKEEN,
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Counsel for Petitioner.

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The Supreme Court of the United States

OCTOBER TERM, 1942.

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased,

Petitioner,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY,

Brief for Petitioner on the Merits

The opinion of the Circuit Court of Appeals in this cause is published in 127 F. (2d) 1012. (R.22). The opinion of the Supreme Court of the State of Utah, to which reference will be made, is published in 99 Utah 464; 105 P. (2d) 461. The order of this Court granting the petition for a writ of certiorari to the Supreme Court of Utah is published in 312 U. S. 670; 85 L. Ed. 1112. The order of this Court dismissing the proceeding is published in 313 U. S. 541; 85 L. Ed.

1509; 61 S. Ct. 840. No opinion was delivered by the District Court of the United States for the District of Utah.

The grounds upon which the jurisdiction of this Court is invoked are:

1. That the district court in dismissing the said proceeding and the Circuit Court of Appeals for the Tenth Circuit in affirming the judgment of dismissal, have disregarded the supremacy of the Constitution and Laws of the United States.

2. That by construction of General Order 50-9, in bankruptcy, the Circuit Court of Appeals has added a substantive provision to section 75 (r) of the Bankruptcy Act, and through such construction, petitioner has been denied rights conferred by Federal Statutes.

3. A conflict exists in the decisions of various Circuit Courts of Appeal as to the construction and application of Section 75 (r) of the Bankruptcy Act.

The jurisdiction of this Court is given by Section 240 of the Judicial Code, 38 USCA, Section 347, and by Section 24 C of the Bankruptcy Act.

STATEMENT

On the 20th day of December, 1937, Anna L. Harris filed a petition in the United States District Court for the District of Utah praying for relief under Section 75 of the Bankruptcy Act. The said petition recited that she was a farmer within the purview of the Act and there was attached thereto schedules A and B showing liabilities of $8,430.00 and assets of an estimated value of $32,500.00. Said matter was referred to the conciliation comissioner for Salt Lake County, who called and held a meeting of creditors. The debtor made an offer of composition and extension on the 21st day of February, 1938. She died on the 23rd day of November, 1938 and on March 30, 1939 let-

ters of administration of the estate of the deceased debtor issued to Sterling P. Harris, the surviving husband, who is the petitioner herein.

On February 15, 1940 the administrator filed his petition in the District Court of the United States for the District of Utah, praying for an order reviving the proceedings under Section 75 of the Act. Attached to the petition was an order of the probate court authorizing the administrator to petition for the revival of the proceedings pending at the time of the death of Anna L. Harris or to institute new proceedings in the United States District Court as advised. On February 15, 1940, the District Court entered an order of revival. Zions Savings Bank and Trust Company appealed from the order of the probate court to the Supreme Court of the State of Utah and served notice that it had given bond to stay the proceedings. On the 13th day of September, 1940, the Supreme Court of Utah reversed the District Court and set aside its order authorizing the administrator to revive the Federal Court proceeding. The opinion of the Supreme Court of Utah is reported in

99 Utah 464; 105 P. (2d) 461.

On September 18, 1940, Sterling P. Harris deposited an amended petition in the office of the Clerk of the United States District Court praying for relief under Subsection (s) of Section 75 of the Bankruptcy Act. The petition was endorsed by the clerk as received on that date.

The administrator applied to this Court for a writ of certiorari to the Supreme Court of Utah. The writ was granted.

312 U. S. 670; 85 L. Ed. 1112.

And after argument was dismissed:

313 U. S. 541; 85 L. Ed. 1509.

During the pendency of the appeal from the order of the probate court to the Supreme Court of Utah and the proceedings in this Court, all proceedings in the District Court

of the United States were held in abeyance. On the 29th day of August, 1941, Zion's Savings Bank and Trust Company filed a motion to strike the petition for the revival of the proceedings filed by the administrator and to dismiss the proceeding upon the following grounds, towit:

> (1) "That each of said petitions were filed without any order or authorization in that behalf of the State probate court, the District Court of Salt Lake County, Utah, which appointed said administrator and wherein the estate of said deceased was and is pending and (2) that said administrator is and at all times was without right, power or authority (R. 11) under the laws of the State of Utah to file said petition or otherwise enter into bankruptcy, and said petitions and each of them were and are wholly void."

A hearing of said matter was had and the District Court made findings of fact, reciting the proceedings as hereinabove set out, from which it drew the following conclusions:

> "1. That being without any order or authority of the State probate court so to do, said administrator was without right or authority to petition this Court to reinstate and continue these proceedings under said Section 75 or to petition this Court (R. 16) for relief under Subsection "S" thereof. That by the State law of Utah, as determined by the Supreme Court of said State, in the matter of said Anna L. Harris, deceased, as aforesaid, the administrator is without power to petition and the probate court is without power or jurisdiction to authorize him to petition this Court for relief, and this Court was without power or jurisdiction to accept or receive his petition.
>
> 2. That therefore the order of this Court given and made herein February 15, 1940, ordering these

proceedings to be continued by said administrator should be vacated, annulled and set aside and held for naught, and the petition of said administrator theretofore filed herein February 13th, 1940 praying to revive these proceedings under said Section 75 should be dismissed.

3. That the amended petition of said administrator praying that the estate of said deceased be adjudged bankrupt and for other relief, pursuant to subsection "s" of said Section 75, which petition was presented to the clerk of this Court by said administrator September 18, 1940, but not filed, was properly refused for filing and should not be received or filed herein.

4. That said amended motion of Zion's Savings Bank and Trust Company to strike the petition of said administrator praying to revive and reinstate these proceedings under said Section 75 and to strike the amended petition of said administrator aforesaid and to dismiss these proceedings, should be denied.

Let the order of the Court be made and entered accordingly.

Dated at Salt Lake City, Utah, this 30th day of September, 1941.

TILLMAN D. JOHNSON, Judge."

On October 23, 1941 an appeal was taken from the District Court to the United States Circuit Court of Appeals for the Tenth Circuit. (R. 22). The record was completed, the case orally argued and on may 5th. 1942 the Circuit Court of Appeals filed its opinion and decision affirming the judgment of the District Court. The opinion is published in 127 F. (2d) 1012. (R. 22).

SPECIFICATION OF ASSIGNED ERRORS

1. The Circuit Court of Appeals erred in holding that Section 75 (r) does not make the administrator of the deceased farmer a farmer within the purview of that Act, and further, in holding that an administrator, even though appointed by authority of State statutes, is not authorized by the Federal statute to apply for the relief granted by Section 75 of the Bankruptcy Act to estates of deceased farmers.

2. The Circuit Court of Appeals erred in holding that Section 8 of the General Bankruptcy Law, 11 USCA, Section 26, does not apply to proceedings instituted under Section 75 of the Bankruptcy Act and that such proceedings pending at the death of the debtor may not be continued by an administrator.

3. The Circuit Court of Appeals erred in construing General Order 50-9 as adding a substantive provision to the statute, and by such construction, denying petitioner his rights under a United States statute.

The Circuit Court of Appeals erred in holding:

> "That the Supreme Court has construed subsection (r) to mean that a personal representative of a deceased may come in and seek to effect a composition or extension of the debts of the deceased under the provisions of Section 75 when such power resides in him by virtue of the State law, and files with his petition an order of the Probate Court authorizing him to proceed." (R. 25)

and concluding that in the absence of such a State law and such an order a personal representative may not proceed under said statute.

ARGUMENT

It will aid the Court in approaching these questions to collate the statutes, the General Order and the decisions of the courts to which these questions have been presented.

Section 75 of the Bankruptcy Act:

> "(r) For the purpose of this Section and Section 4 (b) the term "farmer" includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also, any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or the producton of poultry products, or livestock or livestock products in their unmanufactured state or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur."

The term "farmer" is used in Section 75 (a), (b), (c), (d), (e), (f), (i), (j), (k), (l) and (n) which provides:

> "(n) The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to clerk of the court, praying for relief under Section 75 of this Act, as amended, shall immediately subject the farmer and all of his property wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed

or conditional sales contracts, the right or the equity of redemption where the period of redemption has not, or had not, expired, or where deed of trust has been given as security, or where the sale has not, or had not been confirmed or where the deed had not been delivered at the time of filing petition."

". . . In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of court.

Subsection (o) specifically stays all of the proceedings against the farmer.

This term has been carried on through subsection (s).

Section 53 of the Bankruptcy Law reads:

"Rules, forms and orders. All necessary rules, forms and orders as to procedure and for carrying the provisions of this title into force and effect shall be prescribed and may be amended from time to time, by the Supreme Court of the United States. (July 1, 1898, c. 541, Sec. 30, 30 Stat. 554)."

Section 75 (b) reads:

". . . The Supreme Court is authorized to make such general orders as it may find necessary prop-

erly to govern the administration of the office of the conciliation commissioner and proceedings under this section; but any district court of the United States may, for good cause shown and in the interests of justice, permit any such general order to be waived."

General Order 50-9 reads:

"The personal representative of a deceased farmer who desires in his representative capacity to effect, under Section 75 a composition or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition, etc."

The Supreme Court of Utah, in deciding that a probate court had no power to grant an administrator authority to apply to the Federal District Court for relief under Section 75 of the Act said:

"The question here is not whether the Frazier-Lemke Act permits the administrator of a deceased farmer to file a petition for debtor's relief under the moratorium provisions of the Act, but whether the probate court has the authority to authorize an administrator to file such a petition in the United States District Court in the abated bankruptcy proceeding. (R. 9).

An administrator desiring to seek the benefit of the Frazier-Lemke Act is required under the provisions of the Act to first obtain the authority of the Probate Court which (fol. 9) appointed him and to

exhibit in his petition to the Federal Court his appointment and authorization.

The privilege conferred by the Act in event a legal authorization is made by a court having power to do so is contained in Section 9.

'(9) The personal representative of a deceased farmer who desires in his representative capacity to effect, *under Section 75, a composition* or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers

. . .

'(a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition.' (Italics ours). Gen'l Order 50 (9). 11 U. S. Code Ann. (Sec. 53-100), 1939 Pocket Part, p. 38.' (R. 9)."

In affirming the judgment the Circuit Court of Appeals said:

"The bankruptcy court has no authority to entertain the personal representative's petition unless he attaches the authorization of the Probate Court empowering him to proceed. Lemm v. Northern California Nat'l. Bank, 9 Cir. 93 F. (2d) 709."

. . . .

"7. Furthermore, we feel that by subsection 9 of General Order 50, the Supreme Court has construed Subsection (r) to mean that a personal representative of a deceased may come in and seek to effect a composition or extension of the debts of the deceased under the provisions of Section 75 when such power resides in him by virtue of the State law, and when he files with his petition, an order of the Probate Court authorizing him to proceed."

I.

SECTION 75 (r) CONFERS AUTHORITY UPON AN ADMINISTRATOR TO SEEK RELIEF UNDER THE STATUTE WHICH AUTHORITY MAY NOT BE DENIED BY REASON OF ANY ACT OF THE STATE.

Subsection (r) has been enacted and amended three times — March 3, 1935; May 15, 1935, and March 4, 1940, but the clause in question has remained constant.

There is no room for doubt that Congress, by the repeated use of the word and by the specific definition given in subsection (r) intended the term "farmer" to include "the personal representative of a deceased farmer." So far as we have been able to discover no court, except the Circuit Court of Appeals for the Tenth Circuit, has raised any question as to what the plain words of the statute mean. The General Order was considered in:

Lemm v. Northern California National Bank, 9th Cir. 93 F. (2d) 709

holding that the General Order must be complied with. The ability of the debtor to procure the order or the powers of the probate court were not considered. In

Hines v. Farkas, CCA 5th Circuit, 109 F. (2d) 289,

it was held that the statutes of Georgia authorized an administrator to apply to the Federal Court for relief under Section 75, and that a special administrator was a personal representative. The decisions of the district courts in

In re Buxton D. C. (Ill.), 14 Fed. Supp. 616.

In re Reynolds, District Court (Okla.), 21 Fed. Supp. 369.

were disapproved. General Order 50-9 was not discussed.

The Supreme Court of Utah based its opinion squarely upon the proposition that inasmuch as the State statutes did not authorize an administrator to make such an appli-

cation to the Federal Court that therefore the order of the probate court was void. That

> "The privilege conferred by the Act in event a legal authorization is made by a court having power to do so is contained in Section 9 (referring to General Order 50-9)."

Thus the court confused the statute with the general order.

The Circuit Court of Appeals doubted that subsection (r) was broad enough to include the personal representation of a deceased farmer, but based the judgment upon the failure to comply with General Order 50, saying this Court had so construed the subsection in adopting General Order 50.

The court, as the record now stands, is confronted with the question as to whether a State court, by construction of State statutes, or the State by failure to enact any statute whatsoever, may withhold from the personal representative of a deceased farmer the right to apply for relief under Section 75 of the Act. There are no conditions or reservations in the statute which the representative of a deceased farmer need comply with. The Constitution having conferred upon Congress the power to enact uniform laws on the subject of bankruptcy throughout the United States and the statute having repeatedly been sustained as a proper exercise of that power, it would appear to follow, without question, that the right cannot be taken away by a State.

Clearly a State statute providing that no personal representative of a deceased person shall have power to apply to the Federal Court for relief under Section 75 of the Bankruptcy Act would be void because it would be in direct conflict with the supreme law of the land. Can the same thing be accomplished by indirection by a State court holding that a general administrator appointed by the State has no such power? The State Court in a proper proceeding, having appointed an administrator, he looks to the Federal statute for authority to apply to the Federal Court for relief under the Federal statute. No State

court, so far as we are advised, except the Utah court, has held that the general probate statutes making it the duty of an administrator to gather and conserve the estate of a deceased person are not broad enough to authorize the institution of the proceedings in the federal court. In that respect Utah stands alone.

II.

THE DEATH OF THE DEBTOR DID NOT TERMINATE THE JURISDICTION OF THE FEDERAL COURT OVER HER ESTATE—IT WAS CONTINUED BY SECTION 75 (n) AND BY SECTION 8 OF THE BANKRUPTCY ACT.

Section 75 of the Act makes no reference to a pending proceeding under the Act. Attention has been called to subsection (n) providing that proceedings under this section, except as otherwise provided, shall be the same as if a voluntary petition of adjudication had been filed and a decree of adjudication entered.

We find, therefore, that by the very terms of the statute, section 8 of the general bankruptcy law is adopted by section 75, and if applied, it solves the question; for

Section 8 is:

> "That the death or insanity of a bankrupt shall not abate the proceedings but the same shall be conducted and concluded in the same manner so far as possible as though he had not died or become insane."

But it is said that the express reference to the bankruptcy statute by subsection (n) should be disregarded because the purposes of the general bankruptcy law and the purposes of section 75 are different. Is that true?

The general bankruptcy law originally was intended to relieve honest debtors of their debts through their dis-

charge, and thereby to permit them to rehabilitate themselves. Secured creditors were not materially affected by the Act. Section 75 deals with secured creditors, and the property of the debtors, even though subject to liens and encumbrances to the extent that the creditor is safeguarded up to the value of his security; but he is not permitted ruthlessly to liquidate the securities consisting of the farmer's home, thereby to destroy any equity that the farmer may have in his property; and he is not permitted to recover in the event of a sale, more than the actual value of his securities.

Ultimately, however, the farmer is to be relieved of his indebtedness for it is specifically provided by subsection (s-3) that the farmer may apply for his discharge. In so far as the administration of the estate is involved, there is no essential difference between the proceedings under the general statute and the proceedings under section 75:

Even though an administrator is appointed by the State court, he immediately becomes subject to the jurisdiction of the federal court. After all, it is the property of the deceased's estate, but until the control is relinquished by the bankruptcy court the administrator may not take possession. That is exactly what should be done after administration of the estate of the deceased farmer has proceeded under section 75. The distinction between the two Acts is wholly immaterial, for the purpose is to rehabilitate the debtor by leaving with him his mortgaged farm property either through a negotiated settlement or by redemption at the appraised value. But if the property is not saved, then an order discharging the debtor may be made and the farmer may make a fresh start in his farming operations. There is nothing in the Act which justifies the disregarding of the plain provisions of section 8, which, by express terms, is adopted by subsection (n) of section 75; for under both statutes the bankruptcy court deals with the property.

III.

THE RIGHT OF THE PERSONAL REPRESENTATIVE OF A DECEASED FARMER TO APPLY FOR RELIEF UNDER SECTION 75 OF THE ACT IS NOT RESTRICTED OR LIMITED BY GENERAL ORDER 50-9.

Section 53 of the General Bankruptcy Act and Section 75 (b) pertain to the administrative features of the Act. They have no bearing upon the substantive law, hence, general order 50-9 must be construed in connection with the Act to mean that the papers therein specified must accompany the petition for relief under section 75 only if they are available. A copy of the order appointing the administrator would, of course, be available and that pertains to the orderly administration because the administrator, in order to institute the proceeding must show that he is, in fact, the administrator of he estate of the deceased farmer.

A copy of the order of the probate court authorizing him to file the petition would no doubt be available in all of the States in the United States except Utah.

Is, then, the right to be denied because such a paper is required by the General Order? If so, the General Order goes beyond the statute, and by its application, a substantive right is denied. So construed, the General Order is in conflict with the statute, and it must be disregarded in so far as the requirement of the specific order is involved. This is the view heretofore taken by this Court.

In George M. West Co. v. Lea Bros. & Co., 174 U.S. 590; 43 L.Ed. 1098, the Court said:

> "This reasoning also answers the argument based on the fact that the rules in bankruptcy promulgated by this Court provide in general terms for

an allegation of insolvency in the petition and a denial of such allegation in the answer. These rules were but intended to execute the Act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant, because the particular act relied on, in a given case, conclusively imports a right to the adjudication in bankruptcy if the act be established, the allegation of insolvency in the petition becomes superfluous, or if made, need not be traversed."

And in

Meek v. Centre County Banking Co., 268 U.S., 426; 69 L.Ed. 1028, the Court said:

"The authority conferred upon this Court by Sec. 30 of the Bankruptcy Act to prescribe all necessary rules, forms, and orders as to procedure, and for carrying the Act into effect, is plainly limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions."

No question of the constitutionality of the General Order is involved. The question is simply; Does General Order 50-9 go beyond the authority of the court, construed as it has been, by the Supreme Court of Utah, and by the Circuit Court of Appeals?

So far as known by this writer, the Supreme Court has not construed General Order 50, and certainly the adoption of the General Order cannot be interpreted as meaning, in the face of the statute, that a personal represen-

tative of a deceased farmer is not a farmer, or if a farmer, that he may not, in Utah, file a petition for relief under section 75 of the Act in accordance with its plain provisions. If he cannot it is not because of any federal statute, but solely because the State Supreme Court has said that a federal statute may not be enforced within the boundaries of the State of Utah. Thus the State denies that the constitution and laws of the United States are the supreme law of the land.

It is idle to argue that by giving full force and effect to the federal statute, conflicts may arise between the State and federal courts. That argument may as well be made with respect to section 8 of the general bankruptcy law as to numerous other statutes through which jurisdiction is taken from the State courts and placed in the federal courts. Similar questions arose in the administration of the general bankruptcy law, where State court receivers were involved.

Both the Supreme Court of the State of Utah and the Circuit Court of Appeals have erred in this case in proceeding upon the assumption that jurisdiction of the federal court over the property of the deceased automatically terminated at her death, and that by the institution of the probate proceedings, the jurisdiction over the property was acquired by the State court to the exclusion of the federal court. The administration of the estate temporarily suspended by the death and the abatement meant only that the stay awaited the appointment of a personal representative to speak for the estate in the federal court. The jurisdiction was not and could not have been finally terminated. It was during the time of the suspension of

the administration that it is claimed the exclusive jurisdiction of the State court attached. It was always subordinate to that of the federal court.

It is submitted that the judgments of the Circuit Court of Appeals and the District Court should be set aside, with directions that the Federal Court proceed with the administration of the estate under the provisions of Section 75 of the Act.

Respectfully,

J. D. SKEEN,
E. J. SKEEN,
Counsel for Petitioner.

A copy of the foregoing Brief for Petitioner on the merits received this 20th day of November, 1942.

H. P. THOMAS,
D. H. THOMAS,
Attorneys for Respondent.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1942.
No. 268

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased,

PETITIONER,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY, a corporation,

RESPONDENT.

In the Matter of Anna L. Harris, Debtor, Since Deceased On Writ of Certiorari to the United States Circuit Court of Appeals, Tenth Circuit

RESPONDENT'S BRIEF

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Of Counsel.

Supreme Court of the United States

October Term, 1942
No. 268

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased,

Petitioner,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY, a corporation,

Respondent.

In the Matter of Anna L. Harris, Debtor, Since Deceased
On Writ of Certiorari to the United States Circuit Court of Appeals, Tenth Circuit

RESPONDENT'S BRIEF

FOREWORD

This farmer-debtor case has now visited in all the courts of the land, state and federal.

It commenced in bankruptcy (under §75) in the United States District Court of Utah. It then journeyed to the Utah probate court, thence to the state supreme court, and from there to this Honorable United States Supreme Court which first granted certiorari but on argument dismissed.

It then had rebirth in the Federal District Court, journeyed hence to the 10th Circuit Court of Appeals, and is now revisiting in this Honorable Court.

Outwardly, by its title, it has varied according to the court where it was visiting. But inwardly it has always been the same. Upon the merits it has never changed.

Again and again this case has been briefed. But on the merits the briefs have always been the same.

We know of nothing to be added. Consequently as its brief here, respondent submits its brief below where it was appellee in the Circuit Court of Appeals. That brief follows and is bound herein.

Note, however:

I.

We are trying on this appeal *only* the final order of the Federal District Court made September 30, 1941,—

(a) vacating an earlier order of revivor reviving the bankruptcy proceedings;

(b) dismissing the administrator's prior petition for that revivor;

(c) ordering (for the second time) that an *amended* petition by the administrator under subsection (s) not be filed.

Let there be no mistake. Nothing else is here on trial. **(9-11 infra).**

II.

The administrator claims the right, absolute, to enter into bankruptcy regardless of the refusal of the probate court (his true proprietor apart from whom he cannot exist) to give consent.

That he is the simple arm and instrument of that state court—no more—and has no separate independent autonomy, is clear again for since the judgment below the Supreme Court of Utah has said (October 26, 1942):

> "The court is the guardian of the estate. An administrator or executor simply acts under its orders." In re Stevens' Estate, 130 P. (2d) 85, 87 (Utah).

This accords precisely with the views of this Honorable Court itself (since the judgment below) respecting another species of state creatures:—*Municipalities.*

> "It (the municipality) is wholly subordinate to the unrestrained power of the state over political subdivisions of its own creation.". (Parentheses added) Faitoute Iron & Steel Co. vs. City of Asbury Park, 62 S. Ct. 1129, 1133.

Continuing:

> "A municipal corporation . . . is a representative not only of the State, but is a portion of its governmental power. . . . The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may *enlarge* or *contract* its powers or *destroy its existence*'." *Id.*

If a municipality is only a portion of the state's governmental power, so also is a probate court. Likewise, the administrator who is only the bare creature or instrument of that court.

Powers of cities may be enlarged or contracted by the state. And so may the powers of state probate courts and their administrators no less.

Municipalities may even be abolished altogether by the state. Likewise the probate courts. And their aboli-

tion makes extinct their instrumentality—the administrator. And his extinction would leave no administrator to whom the particular bankruptcy act might apply. Thus Congress would be left powerless to enforce this bankruptcy act regarding administrators for there would be none.

The state's power to abolish at any time the probate courts or their administrators connot be doubted. And if the state chose to do so even *after* an administrator had entered into bankruptcy (even by prior authority of the probate court), could anyone doubt its power in that behalf? Thus the requisite of state consent regarding its instrumentalities of government is clear. A corporation is a creature of the state and may go into bankruptcy. ***But it is not an arm or instrumentality of State Government.*** A probate court is an instrumentality of State Government. And an administrator is simply an arm of that state instrument.

Consent by the state through its probate court is thus both *requisite* and *implicit* in the Bankruptcy Act wherein the administrator is declared to be a farmer for its purposes. This Honorable Court's General Order 50(9) to that effect (requiring probate court consent for an administrator to enter bankruptcy) has indicated that construction.

III.

A representative of a deceased farmer is defined as a farmer by the Bankruptcy Act §75 in question (subsection-r) (infra 13).

But this Court's General Order in Bankruptcy 50(9) requires an administrator who under the Act seeks relief in a bankruptcy court to first obtain authority of the probate court (infra 13). General Orders have the force

and effect of law. Even of specific statutes. (Infra 13). And they are the Supreme Court's indication of its construction of the Bankruptcy Act (infra 27, 36, 44).

Thus by the General Order noted, this Honorable Court has indicated that the Act permits administrators to avail themselves of its benefits *only when their supervisory probate courts have authorized them to.* This administrator was denied authority in this case. He has no authorizing probate order. (Infra 13).

This defeats him as the courts below decided. The Act must be construed according to the General Order of this Honorable Court, *viz.*: That as to administrators it is *impliedly* conditioned upon state court consent. Otherwise it violates the 10th Amendment as a trespass upon the reserved powers of the sovereign State of Utah to establish state courts of justice and to regulate the judges and officers thereof—exclusively a state function. (Infra 24).

The concept of state consent to a Federal Act calculated to impinge upon its sovereignty is now no longer new. Such consent has been acknowledged by this court as requisite regarding the Municipal Bankruptcy Act. U. S. vs. Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137. And regarding tax matters. Steward Machine Co. vs. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293.

Even since the Bekins case this Honorable Court again has said that the Municipal Bankruptcy Act was sustained because,—

> "The statute was 'carefully drawn so as not to impinge on the sovereignty of the State'."

And that under that Act:

> "'The State retains control of its fiscal affairs. The bankruptcy power is exercised . . . only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law'." Faitoute Iron & Steel Co. vs. City of Asbury Park, 62 S. Ct. 1129, 1133.

The lower federal courts had held—even *before* this Court's General Order so providing—that this Farmer-Debtor Act insofar as it assumes to authorize administrators to partake of its relief was subject to the implied condition of state court consent (infra 35).

And the condition of state consent to an instrumentality of state government (municipality) availing itself of federal bankruptcy was authoritatively put at rest by this court in the Bekins case and later reaffirmed in the Faitoute case supra.

The demand of General Order 50(9) requiring state court consent before an administrator may seek the Act's relief is precisely in accord with the *rationale* of those decisions by this court. The courts below ruled accordingly. They held compliance with the General Order mandatory. Their judgments accord with the principle of state consent vouchsafed by those decisions of this court.

IV.

With these preliminary observations respondent for its brief here now adopts its brief below where it was appellee in the Circuit Court of Appeals. Full statement and argument of the case is made therein. It is bound hereto and follows.

The judgments of the Circuit Court of Appeals and District Court below must be affirmed.

Respectfully,

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Of Counsel.
December 3, 1942.

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United States Circuit Court of Appeals

TENTH CIRCUIT

No. 2461

STERLING P. HARRIS, as Administrator of the Estate of Anna L. Harris, deceased, *Appellant*,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY, *Appellee.*

In the Matter of Anna L. Harris, Debtor, Since Deceased.
Appeal From The District Court Of The United States For The District Of Utah.

BRIEF OF APPELLEE

I.

APPELLEE'S STATEMENT OF THE CASE.

Appellant's statement is substantially correct although not complete.

This case has been before many courts, the lowest and the highest in the land. Its history and chronology may thus be difficult to grasp. Therefore, we pause at the outset to fully state that history as it has unfolded in those various courts.

It commenced in the federal bankruptcy court of Utah. It then shifted to the state district (probate) court of Salt Lake County. From there it journeyed by appeal to the Utah Supreme Court. The United States Supreme

Court granted certiorari. Upon hearing and argument the Federal Supreme Court dismissed the certiorari leaving the matter as decided by the State Supreme Court. The case then moved back to the federal bankruptcy court (whose judgment is here for review). It shifted finally to the state probate court once more where it ended.

A complete understanding demands a separate knowledge of the proceedings before each court. They will now be reviewed.

A.

FIRST IN THE BANKRUPTCY COURT.

December 18, 1937 (R. 14) or at least December 20, 1937 (R. 3,—the date is not important) Anna L Harris, appellant's intestate, filed in the federal bankruptcy court of Utah her petition for relief as a farmer-debtor under Section 75 of the Bankruptcy Act, 11 U. S. C. A. §203. This case originated with that event.

Thus (except for making an offer of composition and extension February 10, 1938,—R. 3—at which point nothing further occurred) the activities of Anna L. Harris ended and the case rested.

November 23, 1938 the proceedings had been pending just short of a year and Anna L. Harris died (R. 6-14) January 16, 1939, the bankruptcy court observing Mrs. Harris' death made an order whereby the bankruptcy proceedings were abated (R. 3-14) and the case shifted to the state probate court.

No appeal from that order of abatement was taken. It was never reversed or modified and it still stands.

B.

NEXT IN THE STATE PROBATE COURT.

March 30, 1939 (2½ months after the federal court abated the debtor proceedings) appellant Sterling P. Harris

was appointed administrator of Mrs. Harris' estate by the state probate court and received letters of administration at its hands (R. 6-14).

Thereafter appellee Zion's Savings Bank and Trust Company in a suit against said administrator in the same state court (district courts also sit in probate in Utah, Revised Statutes Utah 1933 §102-1-6) foreclosed its mortgage on real property of the deceased.

The foreclosure judgment was July 17, 1939. August 15, 1939 the bank purchased at foreclosure sale and received the sheriff's certificate of sale.

In Utah foreclosure sales are subject to redemption within 6 months (R. 15).

No redemption was made and so appellant later received a sheriff's deed (R. 15).

February 13, 1940 (just 2 days before the period of redemption expired) the administrator upon petition obtained an order of the probate court (as he conceived he must and as administrators are first required to do by General Order 50(9)—11 U. S. C. A. §53-100, 1941 pocket part, p. 44) authorizing him as the personal representative of said deceased to apply to the federal bankruptcy court for an order to *revive* the debtor proceedings which that court had abated January 16, 1939 after Mrs. Harris' death (R. 5, 15).

The probate court's order, however, also provided for appeal therefrom by the bank to the State Supreme Court and for a stay of said order meanwhile on appeal by supersedeas to be given by the bank (R. 5, 15).

Immediately upon entry of the order on that day (February 13, 1940) the bank appealed, gave the supersedeas, and thereby at once stayed the order as therein provided according to state law (R. 15). The case thus shifted to the Utah Supreme Court.

Utterly disregarding the stay ordered on the appeal, however, the administrator later the same day petitioned the bankruptcy court (by petition already prepared and dated February 9, 1940) to revive the debtor proceedings.

His petition stated he had become equipped with the required order of the probate court and attached a copy (R: 4, 5, 15). It did not state, however, that the order had been stayed on appeal. The bank, however, brought this fact to the attention of the federal court by its answer later filed pending the probate appeal (R. 7).

C.

IN THE UTAH SUPREME COURT ON APPEAL FROM THE STATE PROBATE COURT.

September 13, 1940. On the bank's appeal of the probate court order (authorizing the administrator to proceed to revive the bankruptcy proceedings) the order was reversed by the State Supreme Court in a unanimous decision, because in Utah (1) probate is purely statutory, (2) the probate court and administrator derive their powers exclusively from the statute and have only the powers so conferred, (3) those statutes do not expressly or by implication authorize an administrator to enter into bankruptcy nor may a probate court direct him to do so, and (4) moreover, by the Utah law of descent which attaches immediately on death, all property real and personal vests in the heirs and its devolution is not suspended or changed by any prior intervention of bankruptcy jurisdiction. R. S. U. 1933, §101-4-2, Zion's Savings Bank vs. Harris, 99 Utah 464, 105 P. (2d) 461.

Thus the purported authorizing order of the probate court (which had been stayed and utterly deprived of force pending the appeal) required by General Order 50(9),

sought by the administrator and therefore conceded by him to be requisite to his effort in the bankruptcy court, was swept away and denied him leaving him utterly bereft of even its dubious effect.

D.

IN THE UNITED STATES SUPREME COURT ON FURTHER APPEAL FROM THE STATE PROBATE COURT.

By the State Supreme Court's reversal the administrator was left without the authority of the probate court required by General Order 50(9) to pursue the proceedings in the bankruptcy court.

And so adopting the view that the probate court had no power to deny him, he sought and was granted certiorari in the United States Supreme Court to review the reversal by the State Supreme Court. Harris vs. Zion's Savings Bank, 312 U. S. 670, 61 S. Ct. 611.

The case was heard and argued before the United States Supreme Court. April 14, 1941 that court per curiam dismissed the certiorari thus sustaining the State Supreme Court's reversal upon the grounds that,—

> "The Supreme Court of Utah has held that under the Probate Code of the State the Probate Court had no power to make the order. The decision thus rests upon an adequate non-federal ground."

and remarking that the federal question,—

> "Whether in such circumstances a District Court of the United States sitting in bankruptcy could entertain a petition of the personal representative of the deceased farmer under Section 75 of the Bankruptcy Act, was not necessarily involved."

And so from the United States Supreme Court the case was remanded to the State Supreme and probate courts where the latter, August 25, 1941, annulled the order pursuant to that reversal. (R. 15)

And then the case shifted back to the federal bankruptcy court where it had started.

E.

BACK IN THE BANKRUPTCY COURT AGAIN.

By the State Supreme Court's reversal and his unhappy appeal to the United States Supreme Court the administrator was denied by the probate court, his creator, and still stands without that which the General Order has lawfully ordained as indispensable and prerequisite to any effort by him before a bankruptcy court, and which he was bound to exhibit there at the outset as part of any application and without which no administrator may enter,—

> "An order of the probate court authorizing him to file the petition." General Order 50(9).

But at this point he changed his view and took the position that no authority by his creator, the probate court, was necessary despite the specific command of the General Order to the contrary, and set about, notwithstanding, to proceed in bankruptcy where his intestate had left off.

Meanwhile, remember, he had already petitioned the bankruptcy court for a revivor on the strength of the probate court's ill-fated order which had already been stayed. He had done this in violation of the stay already effected the same day by the bank's appeal and supersedeas (R. 4).

Also, meanwhile (2 days later, February 15, 1940, the day of expiration of the redemption period in the bank's foreclosure) he had persuaded the bankruptcy court to order the bankruptcy proceedings to be "*continued*" by him as administrator. This also he had done in the face of the bank's appeal and stay already effected (R. 7).

And March 14, 1940 to apprise the bankruptcy court, the bank had answered the administrator's revivor peti-

tioner there; had suggested the probate appeal and stay which had already been effected; the consequent invalidity of the administrator's unauthorized efforts and the invalidity of the bankruptcy court's purported order of "*continuation*" of the proceedings based upon that invalid effort. Here the matter rested thus pending the probate appeal (R. 8).

September 18, 1940 (5 days after the state court's reversal of the probate order) the administrator "deposited" with the clerk in bankruptcy an *amended* petition under subsection (s) of the Act.

That same day, however, the bankruptcy court in view of the State Supreme Court's decision 5 days earlier, refused to accept the amended petition and ordered it not filed. It also ordered the administrator to show cause why his revivor petition should not be dismissed (R. 10).

Meanwhile, the probate order journeyed from the State Supreme Court to the United States Supreme Court; the certiorari was dismissed, and the probate court set the order aside in pursuance of the reversal August 25, 1941. (R. 15).

August 29, 1941 the bank again attacked the revivor petition and also the amended petition "*deposited*" under subsection (s) by motion (amended motion) in the bankruptcy court. The attack was by motion to strike both petitions for want of authority by the probate court required by General Order 50(9). The motion and supporting affidavit recited the history of the case (R. 11).

September 30, 1941 the cause was heard by Judge Johnson in federal court. He made findings (R. 15), conclusions, (R. 15) and a final order (R. 17).
The findings are a recital of the case history.
The order following the conclusions of law:

(A) Annulled and vacated the previous order "*continuing*" the bankruptcy by the administrator.

(B) Dismissed the administrator's revivor petition.

(C) Rejected and finally again ordered that the administrator's amended petition under subsection (s) not be filed.

(D) Denied the bank's motion to strike the petitions and dismiss.

Thus ended the case in the bankruptcy court. From that order the administrator appeals.

But he did not appeal at once. Still struggling with the command of General Order 50(9) he turned again to his creator, the probate court, for some color of authority to sustain him in taking this appeal. This time he petitioned that court for authority to appeal the final order of the federal court. He was refused as will presently appear.

F.

AGAIN IN THE PROBATE COURT.

October 10, 1941 (after the bankruptcy court had dismissed and rejected his petitions and annulled the order of revivor) the administrator petitioned his creator, the probate court, for leave to take this appeal. The bank protested (R. 18).

October 17, 1941 the probate court denied and dismissed his petition and ordered:

(a) That he not be authorized to appeal.

(b) That the prior reversal by the State Supreme Court of his purported authorization to revive the bankruptcy was res judicata of the matter. (Stipulation R. 18, 19)

This last order of the probate court was not appealed and stands. Appeal time expired January 17, 1942 (90 days) by Utah law. Session Laws Utah 1939, p. 158, §104-41-2. Here ends the history of this case.

II.

WHAT IS BEFORE THIS COURT ON THIS APPEAL.

With the history of this case in mind let us consider what is before this court on this appeal. What are we trying?

A.

What We Are Not Trying.

We are not trying the order which abated the bankruptcy. That order was made January 16, 1939. No appeal was taken and it became final more than 3 years ago (R. 3).

We are not trying the ill-fated probate order (stayed on its appeal) which purported to authorize appellant to seek a revivor in bankruptcy and which was reversed and annulled by the State Supreme Court. Even the United States Supreme Court acknowledged itself powerless to do that (R. 15).

We are not trying the foreclosure proceedings in the state court which resulted in judgment for the bank July 17, 1939 (R. 15). They have never been questioned or attacked in any court.

We are not trying the federal bankruptcy court for having wrongfully dismissed the bankruptcy proceedings. The bank's motion to dismiss was *denied* (R. 17-18). Appellant has mistakenly assigned error upon an *alleged dismissal.* (His Brief 4).

We are not trying the power of the federal court as to what that court might have done upon its own initiative.

We are not trying any of the foregoing.

B.

What We Are Trying.

Only the matters set forth in the notice of appeal are being tried (R. 19). That notice reveals the answer to what

is before this court. This appeal is from Judge Johnson's final order of September 30, 1941 (R. 17-18); nothing else.

Only the following 3 matters contained in the order are being tried:

We are trying (1) that part of the order which vacated and annulled the earlier order of revivor made February 15, 1940 on the administrator's petition presented to the bankruptcy court 2 days before when the ill-fated probate order of authority was given, and which was later reversed (R. 17).

We are trying (2) that part of the order which dismissed the administrator's petition to revive after the federal bankruptcy court learned of the state court reversal of the probate order of authority previously purported to have been granted the administrator (R. 17).

We are trying (3) that part of the order which ordered for the second time that the administrator's amended petition under subsection (s) not be filed (R. 10, 18).

We are trying only the 3 foregoing matters contained in the order appealed from. Nothing more.

III.

THE ORDER OF ABATEMENT WAS CONCLUSIVE.

Appellant argues that the death of Mrs. Harris in bankruptcy did not work an abatement of the proceedings. He cites §8 of the Bankruptcy Act which says death does not abate. 11 U. S. C. A. §26.

By that section the debtor's death *itself* did not accomplish that result. *But Judge Johnson's order of January 16, 1939 did.* His order said:

> "It is hereby ordered, adjudged and decreed that this cause do now abate." (R. 4)

Now the Act does not say that the court may not abate. It simply says that death alone does not. But for argument, if it were an interdiction against a court's abatement, still the court had jurisdiction and its order was only error at most, not void, and could be attacked only on appeal and not collaterally.

The rule applies in bankruptcy as in other proceedings. Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 S. Ct. 773. And an order by a bankruptcy court permitting a creditor to foreclose against a debtor already in court under §75, even if erroneous, becomes conclusive in the absence of timely appeal. Bernards vs. Johnson, 62 S. Ct. 30.

And this court itself says that a bankruptcy order authorizing issuance of a sheriff's deed after a debtor is sheltered within §75, though erroneous, is not void. And it may not even be challenged collaterally later on an appeal from another order in the same proceedings. Buttars vs. Utah Mortgage Loan Corporation (10 Cir.) 116 F. (2d) 622. Certiorari denied, 313 U. S. 572, 61 S. Ct. 958.

So the order of abatement was conclusive.

And appellant so regarded it for (1) he petitioned the *probate* court for authority to *revive* and (2) he next stated in his petition to the *bankruptcy* court that,—

> "by reason of the death of said debtor the said proceedings was abated"

and prayed,—

> "for an order of this (bankruptcy) court *reviving* and reinstating said proceedings under the terms of §75 of the said Bankruptcy Act." (R. 4).

But appellant does not ask to have that order vacated. It occurred January 16, 1939. The only order he appeals is the final order of September 30, 1941 (1) vacating the revivor, (2) dismissing his earlier petition to revive and (3) rejecting his amended petition under subsection (s) which he "deposited" with the clerk.

IV.

SINCE APPELLANT HAS NO AUTHORITY FROM THE PROBATE COURT, HIS CREATOR, THE BANKRUPTCY COURT PROPERLY REFUSED TO RECEIVE HIM.

The administrator relies here, as he has done in all courts where this case has visited, wholly upon that part of the Bankruptcy Act §75 (r) which includes a deceased farmer's administrator within the definition of a farmer,—

> "For the purposes of this section . . . and Section 202, the term 'farmer'. . . includes the personal representative of a deceased farmer." 11 U. S. C. A. §203 (r).

But he refuses to accept the accompanying burden of General Order 50(9) promulgated by the United States Supreme Court January 16, 1939 (the very day the bankruptcy court abated the proceedings) which was designed by the Court respecting the Act. It provides:

> **General Order 50(9).**
>
> "The personal representative of a deceased farmer who desires in his representative capacity to effect, under section 75, a composition or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition," . . . etc. General Order 50(9). 11 U. S. C. A. (§§53-100), 1941 Pocket Part, p. 50.

General Orders have the force and effect of law. Leonard vs. Bennett (9 Cir.) 116 F. (2d) 128. Sabin vs. Blake McFall Company (9 Cir.) 223 F. 501. In re Gerber (9 Cir.) 186 F. 693. Even of a specific statute. Sherman and Son vs. Corin (1 Cir.) 73 F. (2d) 468.

By that General Order requiring administrators to first gain authority from their creators, the probate courts,

the United States Supreme Court recognized the paramount power of such courts over their creatures, administrators and executors. It thereby conceded them as incompetent in bankruptcy without such authority and rightly so, for they are only the creatures of the courts which create them, and no more, being officers of those courts and wholly subservient to their control and to the limitations of the applicable state statutes.

Moreover, that view was fully recognized by positive statute elsewhere in the Bankruptcy Act where former §74, (11 U. S. C. A. §202 now amended and incorporated in Chapters 10-14, 11 U. S. C. A. §§501-1103 see table of Bankruptcy Act sections, 11 U. S. C. A. §201 to end, p. ix) included the personal representative of a deceased but expressly required that he first "obtain the consent and authority of the court which has assumed jurisdiction of said estate."

Now the denial of the probate court's consent was not the product of simple refusal by that court to yield its consent to the administrator, although that alone by General Order 50(9) would have been sufficient. It was upon more solid ground as the state court's opinion reveals. It was altogether upon the firm ground that state statutes comprising the Utah Probate Code as construed by the high state court, the final arbiter in such cases, do not permit administrators to shake off the jurisdiction of their creators, the probate court, and stray afield beyond its domain, neither do they allow that court to permit them to do so; and also upon the ground that the administrator had no title to the property, it having devolved *instanter* upon the heirs. The highest state court having reached that result regarding a matter of state law, its decision is conclusive. Since neither administrator nor probate court were endowed by the Utah Probate Code of the power sought, the state court's decision upon that point is conclusive.

The Utah Supreme Court said:

> "The question here is not whether the Frazier-Lemke Act permits the administrator of a deceased farmer to file a petition for debtor's relief under

the moratorium provisions of the act, *but whether the Probate Court has the authority to authorize an administrator to file such a petition in the United States District Court.*" (Italics added). In re Harris' Estate, 105 P. (2d) 461.

Then recounting the necessity of state court consent as required by General Order 50(9) the State Supreme Court approached the problem of the administrator's authority and powers by investigating their source, finding it to be exclusively in the Probate Code:

> "The source of the administrator's power and that of the probate court must be found in the Probate Code. Nowhere in the Probate Code is there any power expressed authorizing an administrator to resort to the Frazier-Lemke Act or permitting the probate court to authorize him to do so. Federal courts have no jurisdiction in probate matters in respect to the administration of the estates of deceased persons. 2 Hughes Federal Practice, Jurisdiction and Procedure, Sec. 985."

Continuing, the court remarks:

> " 'Proceedings for the administration of estates of decedents are purely statutory.' 1 Bancroft's Probate Practice, p. 76, Sec. 37."

And:

> "Jurisdiction of the Probate Courts to administer upon the estate of decedents is primary and *exclusive*. 1 Bancroft's Probate Practice, p. 62, Sec. 33." (Italics added).

Then of the origin and extent of the state probate court's powers, it is said:

> " 'The court, sitting in probate, derives its power from the statutes and has *only* such powers as are granted by statute or reasonably implied or reasonably necessary and proper to effectuate the powers which are given.'" In re Cloward's Estate, 95 Utah 453, 82 P. (2d) 336, 339, 119 A. L. R. 123.

"The problem presents the anomaly, if allowed, of a probate court *divesting* itself of the management of the estate and permitting its appointee who represents the interests of the heirs, if there are any heirs of the deceased, to be subjected to the jurisdiction of another tribunal." (Italics added).

Then of the administrator's status and limited right to the property the court adds:

"The administrator is neither a debtor nor a bankrupt, and has only the control of the property for the purpose of pursuing the statutory *probate* proceedings in order that the heirs may receive what there is remaining after the expenses of administration have been paid and the claims of creditors have been satisfied." In re Harris Estate, 105 P. (2d) 461, 462.

And upon other considerations the Utah Supreme Court likewise concluded that the administrator and probate court are powerless under the state code. It referred to Section 101-4-2 Revised Statutes of Utah 1933, which deals with descents of property of intestates and is as follows:

"The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purpose of administration." Revised Statutes of Utah 1933, §101-4-2.

This statute, the court holds, casts the property of an intestate upon his heirs and hence the administrator has no title to take into the bankruptcy court even could he be given leave to go.

And in its view the Utah court was well supported. In re Buxton (D. C. Ill.) 14 F. Supp. 616. That case was decided before the General Order. But the supreme authority of probate courts over their creatures was at once recognized and the fact that in Illinois title to real property descends at once to the heirs, as all property both real and personal does in Utah, leaving the administrator without

title, impelled that court to conclude the administrator could not enter into bankruptcy.

And within this circuit an Oklahoma federal court opinion was also found to support the Utah decision. In re Reynolds, 21 F. Supp. 369. The facts were strikingly similar to our own and the Utah Supreme Court decided its rule was sound.

There 3 months (here 11) after filing, the debtor died and the proceedings were dismissed.

One month later (here 2) the administrator was appointed.

Eleven months thereafter (same here) administrator petitioned the federal court to revive.

He was met with a motion to dismiss on the grounds title vested by Oklahoma law *instanter* in the heirs; not in the administrator. The applicable Oklahoma law (O. S. 1931 §1615, 84 Okl. St. Ann. §212) is identical with Utah's Revised Statutes 1933 §101-4-2, supra 16, and vests the property real and personal of intestates in the heirs; not in an administrator.

Judge Vaught there ruled the administrator could not enter his federal court because he had not received the prior consent and authority of his creator, the Oklahoma county court. Judge Vaught declared:

> "The question of whether or not an administrator can maintain an action in bankruptcy under section 75 of the Bankruptcy Act has not been passed upon by the higher courts, but in an opinion involving the same substantial provisions of the statutes of Illinois as are contained in the Oklahoma Statutes, with reference to the powers of executors and administrators, the District Court for the Eastern District of Illinois, in the case of In re Buxton's Estate, 14 F. Supp. 616, has held (quoting from the sixth syllabus): 'Deceased farmer's administrator, appointed under Illinois law, could not be adjudicated a bankrupt under statute, notwithstanding statute includes personal representative of deceased

> farmer within designation of "farmer," in view of limited authority of administrator over decedent's real estate under Illinois law and his consequent inability to subject decedent's real estate to provisions of statute (Bankr. Act §75(r, s), as amended, 11 U. S. C. A. §203(r, s).'" In re Reynolds, 21 F. Supp. 369, 371.

And, unable to conceive of a different result under the circumstances, he concluded:

> "The Illinois statute is so similar to the Oklahoma statute that the court cannot conceive of a different conclusion under the circumstances of this case, than that reached by Judge Wham in the Illinois case. It is the judgment of the court that the administrator cannot maintain this action." In re. Reynolds, supra.

It is worthy of note that both Judge Vaught's decision and that of the Illinois federal court were rendered before the General Order. Though those federal judges and the judges of the United States Supreme Court were widely separated by geography, their decisions and the General Order manifest the unity of legal concept resulting in their minds on contemplating the Act's inclusion of an administrator, merely an arm of the probate court, within its definition of a farmer. Could a mere instrumentality through which a state probate court moves repudiate its master's authority?

Could that which a probate court might appoint or refuse to appoint or remove at will, or which it might chastise for wholly insignificant delicts refuse to do its command?

Could the mere instrument harken to the strain poured out by the definitive subsection (r) and be wooed from its master in whom resides the absolute power to destroy its very existence at will,—even for so little as having stopped to listen to that strain?

Could a mere nonentity, devoid of existence apart from its creator, become the master of that court, detach itself, make off with assets of the heirs, deposit them in bank-

ruptcy and dare the master to reclaim them under pain of contempt against a new tribunal—one bereft of probate powers—adopted by the outlaw?

And once safely harbored within the adopted court, what would become of the powers of the actual parent to chasten or even end the existence of the wayfarer?

Could the latter call upon the adopted court to enjoin the will of the parent apart from whom he has no possible existence?

Could the mere instrumentality by these cumulative efforts equip himself with strength to overpower the true proprietor?

What manner of Frankenstein, then, had a probate court created to destroy itself?

These perturbing queries seem to have occurred at once to the legal minds of the Illinois and Oklahoma federal judges and those of the United States Supreme Court upon contemplating subsection (r). They assuredly actuated the decisions of those federal judges. They likewise moved the Supreme Court judges to adopt the General Order.

The provisions of General Order 50(9) are mandatory. Lemm vs. Northern California National Bank, 93 F. (2d) 709. That case came after the General Order. There a California federal court dismissed because the administrator was without an order of the probate court. The Circuit Court of Appeals affirmed saying:

> "An administrator is in a real sense an officer of the state court and is subject to its direction and control. 11 A. Cal. Jur. 77-79. A proper respect for the jurisdiction of the state court demands a strict adherence to the provisions of the General Order. The bankruptcy court has no authority to entertain the petition of a personal representative of a deceased farmer *unless authorization has been obtained by him from his supervisory court.* No authority of this sort was presented by the petitioner and the rules mentioned were in no manner complied with. Since the motion of the appellee creditors to

dismiss the petition was based in part on the petitioner's disregard of the jurisdiction and authority of the probate court, dismissal was proper." (Italics added) Lemm vs. Northern California Nat. Bank, 93 F. (2d) 709, 711.

Here appellant unsuccessfully sought consent of the probate court. It was refused him. The General Order commands that he shall first obtain it. Its requirements are mandatory. The court properly dismissed his unauthorized petitions.

V.

STATE LAWS OF DESCENT ARE NOT SUSPENDED BY BANKRUPTCY PROCEEDINGS OR THE JURISDICTION OF THE BANKRUPTCY COURT.

Appellant makes much of the fact that his intestate died while the bankruptcy proceedings were pending in federal court and after that court's jurisdiction had attached. The implication of this argument, carried to conclusion, is that the proceedings in the bankruptcy court pending at death actually suspended the state laws of descent and distribution. For if regardless of state statutes of descent, an administrator may seize upon the property of the heirs to whom it otherwise descends by state law and by his own whim substitute the administration of a federal court, admittedly without probate powers, for that of a probate court, and withhold it from the heirs three years under the Frazier-Lemke moratorium, then statutes of descent are certainly suspended. None of the heirs, not one of them, may want the bankruptcy proceedings instituted, or if already instituted, maintained over the property. They may all prefer the probate court, upon whom the state law enjoins that duty, to administer and distribute it. Bankruptcy, as it is to most people, may be distasteful to them. They may desire and have ample means themselves to discharge the debt upon the property and receive it at once at the hands of the probate court,—not three years hence. Yet these heirs, the owners in law and to whom the property has descended by state law, cannot prevent a selfish administrator from resorting to bankruptcy and withholding the property—*their own property*—from them if he will. This is exactly where appellant's argument leads.

Moreover, Section 75 is a Bankruptcy Act for *relief* of debtors. When this debtor died the necessity for her relief was ended. As the Supreme Court observed in Local Loan Company vs. Hunt, 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A. L. R. 195, the purpose of the Bankruptcy Act has been "again and again emphasized" as being to give the honest debtor:

> "A new opportunity *in life* and a clear field for *future effort*." (Italics added).

This purpose is now lately reaffirmed in respect to Section 75 itself. In the recent case Wright vs. Union Central Life Insurance Company the court again said:

> "The development of bankruptcy legislation has been towards relieving the honest debtor from oppressive indebtedness *and permitting him to start afresh.*" (Italics added). Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 514, 58 S. Ct. 1025, 1032.

To the same effect see Williams vs. U. S. Fidelity & G. Co., 236 U. S. 549, 554, 555, 35 S. Ct. 289, 59 L. Ed. 713; Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, 582, 55 S. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106.

When this debtor died the purpose of the Bankruptcy Act, relief of a debtor, was at once fulfilled. *Death* afforded that relief to her. In the midst of her endeavors in bankruptcy death had brought to a close that "opportunity in *life . . . for future effort*" which she had hoped the bankruptcy would afford by its "*permitting her to start afresh.*" Thenceforward the property and debts were the concern of those upon whom the property devolved by operation of state law. She no longer required relief as a debtor.

The death of the debtor amidst the debtor proceedings did not stay the state laws of descent but her property was cast accordingly upon her heirs.

VI.

THE STATE COURT'S DECISION IS CONCLUSIVE UPON THE POWERS OF THE PROBATE COURT AND ITS INSTRUMENTALITY, THE ADMINISTRATOR.

Of course, the decision of the Utah Supreme Court is conclusive upon the powers of the state probate court. Since the overruling of Swift vs. Tyson, 16 Pet. 1, 10 L. Ed. 865 state law, both written and unwritten, is determined conclusively by state courts and binds the federal courts everywhere. Erie Railroad Company vs. Tomkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

A decision even of an intermediate appellate state court in the absence of a higher court decision is binding as to state law in the federal courts. Fidelity Union Trust Company vs. Field, 61 S. Ct. 176. West vs. American Tel. and Tel. Company, 61 S. Ct. 179. Six Companies vs. Joint Highway District No. 13, 61 S. Ct. 186, Stoner vs. New York Life Insurance Company, 61 S. Ct. 336. Russell vs. Todd, 309 U. S. 280, 60 S. Ct. 527.

In fact where between judgment and appeal in federal court the highest state court reverses itself changing the state law as it stood upon the federal trial and judgment, the federal appellate courts must abide the change and reverse the judgment notwithstanding it conformed to state law when it was rendered. Vandenbark vs. Owens-Illinois Glass Company, 311 U. S. 538, 61 S. Ct. 347.

The rule applies in bankruptcy courts. They, too, are bound by state court decisions upon state law. Therefore, where questions of property law have not been decided by state courts the federal bankruptcy court must remit the parties to a state court action to assure rights in local property not being determined contrary to state law by the accident of federal jurisdiction. Thompson vs. Magnolia Petroleum Company, 309 U. S. 478, 60 S. Ct. 628.

The rule is indubitable. When the Supreme Court of Utah determined that its state law did not empower a probate court to give consent to an administrator, that proposition was authoritatively concluded forever. It binds this and all other courts within the federal system, including

even the Honorable United States Supreme Court. That court so acknowledged on dismissing the certiorari, Harris vs. Zion's Savings Bank and Trust Company, 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509. A Utah probate court may not empower its administrator to proceed in bankruptcy.

Certainly then its administrator cannot rise above its master and proprietor, apart from whom it never can exist, and claim to be equipped with powers the state has never granted either. His powers derive exclusively by state law. They are bestowed entirely within and by a state court. He is the bare instrument of that court; no more.

The probate judge himself is similarly that court's instrument. He is a state officer of a state court with powers in behalf of and delimited expressly by the state. The "establishing of (state) courts of justice, the appointment of judges" and their regulation is the "exclusive and peculiar province" of each state. Calder vs. Bull, 14 L. Ed. 648.

The regulation of its courts' jurisdiction is wholly a matter for a state. Rejsenhoff vs. Colonial Nav. Co., 35 F. Supp. 577.

As interpreted by its highest court, the Utah laws do not admit of a probate court's consent to an administrator's attempt in bankruptcy. The court itself cannot consent. Neither can the probate judge, for he, too, is but an instrument of that court. A judge could not turn the estate over to a bankruptcy court. The Utah law forbids. Nor could he as judge in behalf of an estate being administered in his court file a petition in bankruptcy and transfer that administration to a federal court,—which has no probate powers. Suppose the Act said a probate judge could take the estate into bankruptcy. The spectacle of a judge himself assuming to file a bankruptcy petition for one of his estates is in law ridiculous to contemplate. He could not. He cannot even consent. And an administrator is an instrument of even lesser power.

The probate court itself is bereft of power to consent. The instrumentality of that court cannot be less bereft.

Both exist by grace of state law only and only within the ambit of state law. That ambit does not encompass the power claimed. Zion's Savings Bank and Trust Company vs. Harris, 99 Utah 464, 105 P. (2d) 461. Probate court and administrator both are therefore unendowed of power to resort to bankruptcy.

VII.

THIS COURT WILL NOT ANNUL GENERAL ORDER 50(9).

Appellant contends he has the right to proceed in bankruptcy by virtue of subsection (r), 11 U. S. C. A. §203 (r) which says he is a farmer.

He holds that right is absolute.

He refuses to be bound by General Order 50(9). Though he first confessed its effect in making application to his probate court and also petitioned the bankruptcy court under the ill-fated probate consent which transpired to be void, upon discovery of that circumstance he became convinced his efforts had been unnecessary. The General Order in his view is not to be observed; the court below should have ignored it, and should have admitted him regardless.

This position can only mean, though appellant will not in terms assert, that the General Order is a nullity and void and that this court should disregard it and avoid its effect.

But circuit judges will not assume to declare a General Order void. That prerogative must be reserved for the Supreme Court who prescribed it. In re Bronx Ice Cream Company (2 Cir.) 66 F. (2d) 620. In re Jaffee (D. C. Mass.) 272 F. 899.

The Circuit Court of Appeals said in the Bronx Ice Cream case:

> "Appellants also take the broad ground that we should hold invalid the last clause of General Order 39 which Local Rule 22 was drawn to carry into effect. On the merits we see no basis for such a decision, but in any event *only the Supreme Court* which, acting pursuant to §30 of the Bankruptcy Act, 11 U. S. C. A. §53, prescribed the General Order should declare it unlawful. We certainly cannot with propriety hold General Orders promulgated by the Supreme Court unlawful. For the foregoing reasons General Order 39 and Local Rule 22 are held valid."

General Order 50(9) is an indication by the Supreme Court of its construction of subsection (r). Such orders and forms in bankruptcy have been referred to by that court as indicating its construction. Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676.

VIII.

CONCERNING ADMINISTRATORS, THE VALIDITY OF SUBSECTION (r) DEPENDS ON ITS CONSTRUCTION AS PRESCRIBED BY GENERAL ORDER 50(9).

Succession to property is exclusively at the will of and subject to the sovereign power of the several states. 16 Am. Jur., Descent and Distribution, §12.

The states have sole power over the devolution of property by descent. 11 Am. Jur., Conflict of Laws, §48.

Manifestly, therefore, the federal courts have no probate jurisdiction:

> "A proceedings for the probate of a will is not a sujt of a civil nature at law or in equity within the jurisdiction vested by the Judiciary Acts upon the federal courts, and they have no jurisdiction over such proceedings and of distribution of estates because (1) *the subject is statutory*, and (2) they are in the nature of proceedings in rem, and proceedings in rem are not a part of general equity jurisdiction of any court.
>
> "The federal courts cannot distribute generally because the state courts must first establish the succession. *In truth they have no probate powers or authority.*" (Italics added.) 2 Hughes Federal Practice 216, 217.

Since the property devolves entirely by grace of state law, and since state probate courts have exclusive jurisdiction, it is important to explore the situation where, as here, a debtor dies during her sojourn in bankruptcy *under* §75.

Now in general bankruptcy a debtor's property vests *instanter* in the trustee. 11 U. S. C. A. §110. It thus *passes* from the debtor. Consequently the debtor's death in *general* bankruptcy does *not* affect the title to the property. It remains in the trustee where it vested. That is why §8 provides that death itself shall not abate a general bankrupcy and that the proceedings shall be concluded notwithstanding (which of course includes a distribution of assets).

11 U. S. C. A. §26. **But not so by §75.** That special proceedings does not vest title in either bankruptcy trustee or court. Title never passes *from the debtor.* He retains the title in himself contemplating that he will eventually emerge rehabilitated and undeprived of it. This court just recently so stated:

> "But a proceedings under Sections (a)—(r) of 75, 11 U. S. C. A. Section 203 (a)—(r) does *not* operate to pass title from the bankrupt to the trustee or the bankruptcy court, but contemplates a status quo pending an adjustment and composition of his debts and is designed to grant a moratorium wherein the debtor will retain title and emerge from the proceedings seized with all the property subjected to the bankruptcy proceedings." Miller vs. Mangus, January 12, 1942. (10 Cir.) 125 F. (2d) 507.

Consequently, a debtor's death in the special proceedings under §75 works a different result respecting property then in general bankruptcy. Whereas in general bankruptcy the bankruptcy court through its *trustee* is seized of the property, in special bankruptcy under §75 the debtor *himself* is vested; not the bankruptcy court or its trustee. Hence, upon the debtor's death all property of which he was seized descends by operation of law—state law—and is cast according to that rule of devolution; and if he die intestate it,—

> "passes to the heirs of the intestate, subject to the control of the (probate) court" etc. Revised Statutes Utah 1933, 101-4-2.

Now laws of descent and of administration in probate are matters exclusively of state concern. They are beyond the competence of Congress and the federal courts. Neither may trespass in regard to the probate court's authority over a deceased's property.

Yet subsection (r) assumes to say that an administrator, the creature and instrument of a state probate court, may leave its master apart from whom it has no existence and take a federal court for an adopted parent. In its fullest implications this is startling. It is at once a trespass

upon the reserved and exclusive powers of the states "to establish state courts of justice and regulate their jurisdiction" heretofore observed. Supra 24. And encroachment by the Federal Government upon the reserved powers of the states contravenes the 10th Amendment which provides:

AMENDMENT X

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

But if an act may by possible construction be sustained, that construction will be indulged. There is a construction, but only one, whereby subsection (r) will survive. That construction the Supreme Court employed when in contemplating subsection (r) it enacted General Order 50(9) to prescribe that administrators must first gain consent of their state courts.

So construed, subsection (r) is unattended by a constitutional doubt. The states continue thus to establish and regulate their probate courts and jurisdiction. Their regulation and jurisdiction in such case is not lost to them or appropriated by the Congress.

The identical principle, we affirm, is already settled in the Supreme Court. Hopkins Federal Savings and Loan Association vs. Cleary, 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 209, 100 A. L. R. 1403. Congress there had enacted under the Federal Home Loan Bank Act (12 U. S. C. A. §1464) that any State building and loan association, a member of the Federal Home Loan Bank (like banks are members of the federal reserve system) might convert itself into a Federal association upon a vote of the stock. It thus would shake off its state proprietor and adopt a federal foster parent.

A Wisconsin association voted to make the change; received a federal charter, and threatened to use it.

Wisconsin, by its bank commission, obtained a state court injunction against the renegade association to hold it to its state charter. The State Supreme Court affirmed.

Wisconsin's position was that (1) the Act was subject to the implied condition of state consent; (2) otherwise, it was void by the 10th Amendment for unconstitutionally trespassing upon state powers.

The Wisconsin Supreme Court adopted the first position to avoid the embarrassing question of constitutional law and held the condition of state court consent was implicit in the Act.

On appeal the United States Supreme Court was more forthright. It found no condition of state consent within the Act and held it void for encroaching on the reserved powers of Wisconsin in violation of the 10th Amendment. It said:

> "Congress did not mean that the conversion from state associations into federal ones should be conditioned upon the consent of the state or compliance with its laws."

And of this effect continued:

> "The Home Owners Loan Act, to the extent that it permits the conversion of state associations into federal ones in contravention of the laws of the place of their creation, is an *unconstitutional* encroachment upon the reserved powers of the states. United States Constitution, Amendment 10."

The fact that Congress may create federal associations, it was said, is not important:

> "The critical question is whether along with such a power there goes the power also to *put an end to corporations created by the states and turn them into different corporations created by the nation.*" (Italics added)

And speaking of the obligation of state chartered associations to retain their status:

> "They may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it."

The court observes that Wisconsin had the right to say how such associations should be formed, supervised and dissolved but has now been told by Congress, through the statute, that its purposes are to be thwarted. This, the court holds, invades the sovereignty of Wisconsin:

> "By the challenged Act of Congress, the same associations are dissolved in other ways and for other causes, and from being creatures of the state become creatures of the Nation. In this there is an invasion of the sovereignty or quasi sovereignty of Wisconsin and an impairment of its public policy, which the state is privileged to redress as a suitor in the courts so long as the Tenth Amendment preserves a field of autonomy against federal encroachment." Hopkins Federal Savings & Loan Association vs. Cleary, supra.

Accepting subsection (r) at its full face value, it might be said to extend §75 to state court administrators regardless of state court consent. In that event it would be void by the Hopkins case, for unconstitutional encroachment is not made to depend on the state agency affected; bank commission or probate court. If the Congress may not "put an end to corporations created by the states," neither may it against state consent put an end to or suspend state laws of descent and distribution, peculiarly and exclusively subjects of state law, by admitting into bankruptcy the administrator *who has no title* and allowing him to bring along property of the heirs and withhold it against their consent three years. 11 U. S. C. A. §203 (s)(2).

And if those state creatures, building and loan associations, "may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it" neither may an administrator, no less a creature of the state and its probate court, divest himself of his franchise as administrator once accepted, being commanded now by state decision to retain it. Zion's Savings Bank and Trust Company vs. Harris, 99 Utah 464, 105 P. (2d) 461.

And if those state associations may not be dissolved by Congress through an invitation to discontinue "being

creatures of the state (and) become creatures of the Nation," neither may administrators be wooed from their probate courts by Congressional act discontinuing them as creatures of the state courts and making of them creatures in a federal forum.

Now the Supreme Court has statutory power to prescribe General Orders respecting the Bankruptcy Act. But it has no such equivalent powers regarding the Federal Home Loan Bank Act. Had it such, it might have exercised those powers and established a General Order under and to save that Act conditioning the change of charter upon state consent. But it was powerless to do so. Is it not a fair deduction then that with the Hopkins case in mind it exercised its powers in regard to bankruptcy and made General Order 50(9) so as to condition subsection (r), as to administrators, upon state court consent?

The invalidity of subsection (r) without state court consent was observed though not decided in the Utah court's reversal of the state probate court. MR. JUSTICE WOLFE in his special opinion touched upon that question thus:

> "I confess I have grave doubts as to the constitionality of subsection (r), but I do not feel that it is encumbent upon me here to resolve those doubts. If the subsection is constitutional it would, if taken literally, confer on the personal representative a power which is not dependent on the action of our courts and by his application to the bankruptcy courts it would place the property under the jurisdiction of the federal courts." In re Harris' Estate, 99 Utah 464, 105 P. (2d) 461, 467.

But the Hopkins case by the United States Supreme Court, supra, affirms that the Act, unless conditioned on state court consent, encroaches upon the agencies and powers of the state and thus by virtue of the 10th Amendment is void. The constitutional "doubts" of MR. JUSTICE WOLFE in the last quotation are thus made realistic by authority.

Hopkins Federal Savings and Loan Association vs. Cleary was by a unanimous Supreme Court (MR. JUS-

TICE CARDOZA). In reference to it later the court unanimously remarked:

> "We have no disposition to qualify what was there said." (MR. JUSTICE ROBERTS) Triegle vs. Acme Homestead Assn., 297 U. S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A. L. R. 1284.

This exclusive sovereignty of states over and concerning the powers of their creatures is revealed also in Federal Land Bank of St. Paul vs. Crookston Trust Company, 180 Minn. 319, 230 N. W. 797.

The Federal Farm Loan Act requires any agent who negotiates a loan for a Federal Land Bank to endorse the note and guarantee its payment. 12 U. S. C. A. §807.

A Minnesota state chartered trust company negotiated and endorsed such a loan. By declared state law of Minnesota, however, guarantees by trust companies wherein they had no beneficial interest were ultra vires.

The Land Bank sought to enforce the guarantee. But it was held unenforceable by the Minnesota Supreme Court. It approached the problem thus:

> "So we come directly to the inquiry as to whether the congress has intentionally undertaken to bestow upon state institutions added authority qualifying them to act as plaintiff's agent under the Federal Farm Loan Act. This would mean authorizing them to do that which, under the law of their creation and existence, was theretofore ultra vires."

And observed:

> "The power to create state banks and trust companies has not been delegated by the United States Constitution and hence under the terms of the Tenth Amendment thereto is reserved to the states . . . The regulation of state institutions is a right of sovereignty relative to which the Congress of the United States can have no concern."

Of the invalid effect of the Act regarding state institutions, the court concluded:

> "If it was the intention of Congress to broaden and enlarge the power of such state institutions, we think it a futile and unconstittuional effort."

The result reached accords with that in the Hopkins case. That result applies herein.

The view that subsection (r) was conditioned on state court consent was taken even before the General Order. In re Buxton (D. C. Ill.) 14 F. Supp. 646. And it was upon that authority that Judge Vaught so ruled. In re Reynolds (D. C. Okla.) 21 F, Supp. 369. Both decisions were relied upon by the Utah Supreme Court on the probate appeal. Zion's Savings Bank and Trust Company vs. Harris, 99 Utah 464, 105 P. (2d) 461.

Upon the condition of state court consent being implied in subsection (r), in re Buxton said:

> "It was not the purpose of Congress through this legislation to attempt to add to or remove limits from the power and authority conferred by a state statute upon a personal representative created solely by virtue of such statute through an order of court authorized thereon as is an administrator of an estate of a deceased person under the laws of Illinois. *Rather* it would seem that the sole purpose of Congress was to make Sections 74 and 75 of the Bankruptcy Act available to the personal representatives of deceased farmers, who by statute, will or other creating means are given sufficiently broad powers to take advantage, depending on the extent of such power, of all or any part of the provisions of said sections." (Italics added) In re Buxton, supra.

Extended to its strict and fullest implications subsection (r) bespeaks Congressional effort to invade the field of probate, exclusively the state's domain, and to adopt the instrument of that court, the administrator who has no existence apart therefrom, for its own. And this apparently against a state's consent. Thus extended, the Act violently contravenes the 10th Amendment by the Hopkins case.

On the other hand, if reason be consulted, the construction of the Act by the Illinois and Oklahoma federal courts applied before the General Order, and that prescribed within the General Order itself and arrived at by the Utah Supreme Court prevails. Thereby state court consent is impliedly requisite within subsection (r). The General Order is to that effect. General Orders are indicated as the Supreme Court's construction of the Bankruptcy Act. Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 55 L. Ed. 676.

The result of our discussion is that subsection (r) without the qualifying interpretation accorded it by General Order 50(9) violates the 10th Amendment. The reality of that result moved the Supreme Court to promulgate the rule. This interpretation means subsection (r) and General Order 50(9) are simply beckoning gestures inviting those administrators who can become lawfully authorized by their states to enter into bankruptcy. Subsection (r) was not intended to invade a state probate code. The promulgating of the Order conclusively implies as much.

The rule of state court consent as applied to federal bankruptcy finds support in United States vs. Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137. There the Second Municipal Corporation Bankruptcy Act (11 U. S. C. A. §401) was sustained. And it was not sustained in the face of opposition by a state for California had *consented* by a statute. The Supreme Court expressly so acknowledged.

> "It is unnecessary to consider the question whether chapter 10 would be valid as applied to the irrigation district in the absence of the consent of the State which created it, *for the State has given its consent.* We think that this sufficiently appears from the statute of California enacted in 1934." (Italics added.)

And the court holds a state may lawfully consent.

> "The State is free to make contracts with individuals *and give consents* upon which the other contracting party may rely with respect to a particular use of governmental authority." (Italics added)

State consent is recognized in tax matters. Steward Mach. Co. vs. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293. There the Social Security Act was sustained. Alabama, by its State Employment Act, complementary to the federal law inviting states to do so, *consented* to its terms. Against a taxpayer's charge of having done so, Alabama, the Supreme Court decided, had not "renounced the plenitude of power inherent in her statehood." In fact, the Supreme Court acknowledged that Alabama's "consent may be revoked."

Consent of states to federal legislation is nowadays a common thing. It has been recognized as proper to be yielded concerning acts of bankruptcy. U. S. vs. Bekins supra. General Order 50(9) as applied to subsection (r) serves to emphasize the rule. State court consent to an administrator is thereby requisite.

That probate courts of some states may yield consent and others not, cannot affect the rule. A particular bankruptcy act may lawfully lead to different results in different states. Stellwagen vs. Clum, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507. This one expressly does so:

> "This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist *in its locality*, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate." (Italics added) 11 U. S. C. A. 203(s)(6).

IX.

GENERAL ORDER 50(9) APPLIES IN THIS CASE.

Appellant suggests that because the debtor died amidst the special bankruptcy proceedings under §75, General Order 50(9) does not apply; the argument being that the latter relates only to administrators who themselves would *institute* the proceedings. This is not so. There is nothing in the Order limiting it to such purpose. The words *"initiate," "institute"* or *"commence"* do not appear. The word used is "effect,"—

> "The personal representative of a deceased farmer who desires in his representative capacity to *'effect'* under Section 75 a composition or extension of the debts" etc. General Order 50(9).

Remember, the extent of Mrs. Harris' efforts had been to make an offer of composition and extension when she died (R. 3). That offer was pending at her death. Her proceedings stood in that condition at that time. No composition or extension had yet been *"effected."* None has ever been. This is admitted by appellant's brief, page 1:

> "An offer of composition and extension was made and while the matter was thus pending, on the 23rd day of November, 1938, the debtor died."

Thus when her administrator sought to reopen and enter those proceedings he was bound to accept them as they were. If he were let in, he would be obliged to take them up where Mrs. Harris had left them off—*in the midst of making an offer of composition and extension.* His efforts if permitted then, would of necessity have been to *resume* the making of that offer to *"effect"* a composition or extension. To *"effect"* either requires consent of the probate court under the General Order. And had the proceedings progressed beyond the composition stage, any effort to gain the 3 year stay within subsection (s) would of necessity have been one to *"effect"* an *extension.*

Appellant so considered. He turned to the probate court. Consent was denied him by the high state court. Pursuing that consent still higher, he turned to the Federal

Supreme Court determined to have it wrest consent from the state. But it refused. It was powerless to exact consent from an unwilling sovereign.

Appellant was thus conclusively without probate court consent. But at this point he changed his mind. He decided consent was not necessary after all. It was not, he persuaded himself, because he was not attempting to *commence* the proceedings. Mrs. Harris had already done that. He was only attempting, so he told himself, to revive.

But the General Order is not confined to a commencement. Its scope is far broader. The Utah Supreme Court and particularly MR. JUSTICE WOLFE in his special opinion on the probate appeal so held. He said:

> "I assume there is no difference between the power to *initiate* and to *revive*. Certainly if a personal representative has power to initiate he has power to revive and if it requires an order of the probate court to permit him to initiate it would also require an order to revive." (Italics added) 105 P. (2d) 461, 468.

What led the Supreme Court to promulgate the General Order? Nothing but the sound legal realism that a probate court should be consulted about what its administrator proposed to do or those proposals might be held invalid. It was nothing less. That realism applies to all proposals of administrators. And it is false to assume that the Supreme Court in this knowledge intended to ordain that an administrator seeking to *commence* a bankruptcy must gain consent of the probate court but that one endeavoring to *revive* a bankruptcy need not. The considerations which require a probate court's consent to an administrator's acts apply equally to his efforts to commence and his efforts to revive. The Supreme Court judges must have been aware of that. The word "*effect*" is appropriate in either case. In either instance the effort is one to "*effect*" a composition or extension. The General Order thus applies to both.

Even before the General Order, however, Judge Vaught ruled that an administrator could not without state court authority enter a proceedings which had been

commenced in the lifetime of the debtor. In re Reynolds (D. C. Okla.) 21 F. Supp. 369. His view thus coincides with that of Justice Wolfe supra. Both ruled that authority is necessary to revive.

In re Morgan is not authority to the contrary. *No administrator* was involved. The debtor died amidst proceedings under former §74. 11 U. S. C. A. 202-202 a. No General Order had been made. But the latter section required probate consent to "*invoke* the relief provided."

No administrator was appointed. The moving party was a creditor, the National City Bank of New York. It moved for a *receiver* because of the vacant proceedings. The case came on upon that motion. The creditor's motion was granted and a receiver appointed. The question was whether the court had power to appoint a receiver. It ruled that it had.

Thus ended the question before that court and there that judge should have stopped. But instead, he went on to explore the Act in regard to administrators notwithstanding none had been appointed and none was yet before him; and while exploring beyond the case made the statement—*purely dicta*—that consent was not required by the Act for an administrator to reopen.

The statement was pure dicta. Moreover, the sense of the word "*invoke*" employed in that Act is more accurately confined to a commencement than the broad word "*effect*" of the General Order which encompasses whole fields of action.

Chapman vs. Federal Land Bank of Louisville (6 Cir.) 117 F. (2d) 321 cited by appellant is of no benefit to him. In that case consent had actually been given. The administrator had obtained an authorizing order of the Ohio probate court. The Circuit Court of Appeals acknowledged it was powerless to investigate that order for it, that court said, was res judicata against collateral attack. This is only sensible law. When one court makes an order, another has no power to impugn it collaterally. Consequently the creditor in the Chapman case had no right to suggest that the administrator was powerless under Ohio state law.

The authorizing order of its probate court had put at rest that question.

This same question is at rest in Utah. There state law does not permit.

The General Order applies in this case. Appellant by his conduct construed it to apply. He first turned to the probate court for consent. When the State Supreme Court held it could not be given, he sought to wrest it forcibly notwithstanding, by appeal to the Federal Supreme Court. He failed. And after judgment had been entered in this case below, still clinging to that concept, appellant turned again to the probate court. He asked for its consent to this appeal. But powerless by Utah law to yield it, the probate court denied him its consent (Stipulation R. 18-19). His construction up to then; that of MR. JUSTICE WOLFE on the probate appeal and the Utah Supreme Court; our own from the beginning, and that required by the General Order—all, we submit, permit of no escape from the requirements of state court consent in every instance where an administrator would apply to a bankruptcy court, whether to commence a proceedings or to enter into one previously begun. Either effort is one to "*effect*" a composition or extension.

X.

CONCLUSION.

In conclusion let us point out again that only the bankruptcy court's order of September 30, 1941, is before this court on this appeal. Nothing else.

1. **We are not trying** the order of abatement. It was made more than three years ago, January 16, 1939 (R. 3, 14). It was never appealed and is conclusive. The time for its appeal expired February 15, 1939. And it was a proper order, too. No title had vested in the court or bankruptcy trustee as in general bankruptcy. It remained in the debtor. Miller vs. Mangus (10 Cir.) 125 F. (2d) 507, supra 29. Her death cast it upon her heirs by the Utah law of descent *instanter*. Title thereby changed. Hence, it was only proper that the proceedings be abated. But if it were not a proper order it was simply error at the most. The court had jurisdiction, and effor committed in such circumstance can be attacked only on appeal and not collaterally. Union Joint Stock Land Bank of Detroit vs. Byerly, 310 U. S. 1, 60 S. Ct. 773. Bernards vs. Johnson, 62 S. Ct. 30. Not even collaterally herein upon this appeal from another order in the same proceedings. Buttars vs. Utah Mortgage Loan Corporation (10 Cir.) 116 F. (2d) 622. Certiorari denied, 313 U. S. 572, 61 S. Ct. 958. Supra 11.

2. **We are not trying** the ill-fated probate order purporting to authorize appellant to seek a revivor. That order was made by the state probate court. It was stayed by supersedeas and reversed by the State Supreme Court on appeal, and so, was never of any legal force whatever. The United States Supreme Court acknowledged its reversal as conclusive.

3. **We are not trying** the bankruptcy court below for having dismissed the *proceedings*. The bank's motion in that respect was *denied* (R. 17-18). Appellant mistakenly complains of that alleged dismissal. The dismissal was of his first *petition;* that of February 13, 1940, to revive.

4. **We are not trying** the court below as to what it should

or could have done if anything upon its own initiative. We are not trying any of the foregoing.

5. We are trying only the final order of September 30, 1941 (R. 17-18); nothing else. And only the following parts thereof are here on trial:

(1) *That part vacating the erroneous order of revivor previously entered by the bankruptcy court upon appellant's petition to revive based upon the invalid authority of the probate court* (R. 17-18).

(2) *That part dismissing the administrator's petition to revive because of its invalid authority which left him unable by its reversal to comply with General Order* 50(9).

(3) *That part rejecting for the second time the administrator's amended petition for a three year stay by subsection (s); which petition had been "deposited"* (R. 9) *previously with the clerk and already ordered* (R. 10) *not to be filed* (R. 17-18).

6. Since appellant is without authority from the probate court, his creator and proprietor apart from whom he does not exist, the bankruptcy court properly refused to receive him. A valid authority by the probate court is the first requisite of General Order 50(9). But the Probate Code of Utah does not permit of a probate court's giving that authority to its administrator, simply an instrument of that court (R. 15). Zion's Savings Bank and Trust Company vs. Harris (Utah), 99 Utah 464, 105 P. (2d) 461. Certiorari granted and dismissed. The jurisdiction and powers of probate courts and of their instruments, judges and administrators, are questions of state law. The State Supreme Court's decision upon that jurisdiction and those powers is conclusive and binds the federal courts everywhere. Supra 24.

7. State laws of descent are not suspended by the bankruptcy proceedings under §75. Thereunder title remains in the debtor at all times. Miller vs. Mangus (10 Cir.) supra. The state laws of descent attached instanter on the debtor's death and the property was cast upon her heirs accordingly. Supra 21.

8. Federal district courts and circuit courts of appeal will not assume to declare a General Order void. Only the Supreme Court may do that. Supra 28.

9. Concerning a state probate court's administrator the validity of subsection (r) depends wholly upon its construction as prescribed by General Order 50(9). That construction conditions the administrator's bankruptcy efforts on state court consent. If not impliedly conditioned thereon, subsection (r) is a trespass on the reserved powers of the sovereign State of Utah to establish and regulate state courts of justice, including probate courts, and to appoint and regulate the officers thereof, including judges and administrators. Calder vs. Bull, 14 L. Ed. 648. Rejsenhoff vs. Colonial Nav. Co., 35 F. Supp. 577. The 10th Amendment lies athwart that trespass.

A determination to adopt and make off with a state-chartered and regulated agency is an unconstitutional gesture by the Federal Government. It may not do so against the will of the state. Hopkins Federal Savings & Loan Association vs. Cleary 296 U. S. 315, 56 S. Ct. 235, 80 L. Ed. 209, 100 A. L. R. 1403. An administrafor appointed and regulated exclusively under state law, by a state probate court apart from whom he cannot exist, and whose franchise is terminable at its will is clearly a state agency. Invalidity of the federal effort does not depend on the agency coveted—be it building and loan association or administrator.

Knowing this, the Supreme Court, in the exercise of its power to prescribe "all necessary . . . orders . . . for carrying the provisions of this title (bankruptcy) into force and effect" (11 U. S. C. A. §53), prescribed General Order 50(9). In so doing it indicated its construction of the Act. Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 55 L. Ed. 676. That construction recognized subsection (r) as conditioned upon state court consent. And that construction is the sensible one. It was recognized even before the General Order. In re Buxton (D. C. Ill.) 14 F. Supp. 616. In re Reynolds (D. C. Okla.) 21 F. Supp. 369. Cf. Zion's Savings Bank and Trust Company vs. Harris, 99 Utah 464, 105 P. (2d) 461.

State consent is now fully recognized as lawful wherever it is yielded. It may be given in tax and social security matters. Steward Mach. Co. vs. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293. And specifically regarding bankruptcy. U. S. vs. Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137.

Applying the construction of subsection (r) indicated by the Supreme Court's General Order 50(9) state court consent is requisite, and the Act is valid. It is elementary that a construction which sustains an Act must be selected over one which will annihilate it. Subsection (r) and the General Order are beckoning gestures—no more—to those administrators who can lawfully gain state court consent. Supra 36.

10. The fact that the courts of some states may yield consent and others not, cannot effect the rule. In fact, among the courts within a single state this may result. However, a particular bankruptcy act may lawfully lead to different results in different states. Stellwagen vs. Clum, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507. This one actually does, for it directs each court to terminate the stay of subsection (s) whenever the emergency has passed "in its locality." 11 U. S. C. A. 203(s)(6), supra 37.

11. General Order 50(9) applies herein. It applies to every effort of an administrator to "*effect*" a composition or extension. It is not limited in terms to a "*commencement.*" The words "*initiate,*" "*institute*" or "*commence*" do not appear. "*Effect*" includes whole fields of action. It includes every effort by an administrator before a bankruptcy court. In Justice Wolfe's opinion on the probate appeal (105 P. (2d) 468) it was so declared. There was no difference, it was said, between the power to *initiate* and to *revive*, and that if it requires probate authority to *initiate* it requires it to *revive*. This was also the effect of Judge Vaught's decision. In re Reynolds (D. C. Okla.) 21 F. Supp. 369.

Appellant construed the General Order to this effect himself. He turned to the probate court. He even appealed to the United States Supreme Court in quest of state court consent to *revive*. And again after its denial, and even

after judgment below herein, he asked the probate court for its consent—this time to appeal this cause. Yet if consent is not requisite at the stage where an administrator applies for a revivor, because of being requisite only at the start, it cannot be required at any subsequent stage of the proceedings; not even at the stage where he appeals.

The considerations which require a probate court's consent to an administrator's acts apply equally to his efforts to *commence* or to *revive*. It is foolish to reason otherwise. An administrator may not get into bankruptcy either at the start or afterward without probate consent. The Supreme Court knows this. To argue otherwise is to deny their knowledge. The word "*effect*" is quite appropriate in every instance. It is particularly appropriate here. Any effort by the administrator, if let in, would necessarily have been to "*effect*" that composition the deceased had already offered, or on its failure, to "effect" an "extension of the debts" under subsection (s).

12. Assume for argument the order of abatement had never been made at all. The case remains the same. The administrator in such case would still have to get himself into the proceedings in place of the decedent. And to do so, like any new party to a cause, would have to petition or apply to be let in. But being an administrator he would first have to obtain authority of his creator and proprietor, the probate court, because the General Order says so. Without that authority, the General Order says, a court of bankrupty may not receive him.

Appellant tried to get into these proceedings in place of the decedent. And like new parties must, he petitioned to be let in. But he had no authority of the probate court directing him to do so. And because of that his application was denied; the court dismissing his petition to get in. This was the petition to revive (R. 4).

Thus, if the abatement had never been ordered, the case remains unchanged for the court was powerless to admit appellant without probate consent and properly refused to do so. And its order vacating the previous revivor (which had rested on appellant's unauthorized petition therefor) and rejecting appellant's amended petition under

subsection (s) was likewise proper. Hence, if the abatement had not been entered—or even were it void, and it is not—the case remains unchanged.

13. The order appealed from (1) vacating the erroneous revivor previously entered pursuant to the invalid probate order of consent; (2) dismissing appellant's petition to revive based upon that invalid consent which left him without a compliance as to General Order 50(9); and, (3) rejecting the second time his amended petition for a three year stay (subs. s) is proper in all respects. It must be sustained with costs to appellee.

Respectfully submitted,

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Attorney for Appellee.

THOMAS & THOMAS and
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Of Counsel.

April 13, 1942

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No. 268

The Supreme Court of the United States

OCTOBER TERM, 1942.

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased Debtor,

Petitioner

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY,

Respondent.

PETITION FOR REHEARING

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The Supreme Court of the United States

OCTOBER TERM, 1942.

STERLING P. HARRIS, Administrator of the Estate of Anna L. Harris, Deceased Debtor,

Petitioner,

vs.

ZION'S SAVINGS BANK AND TRUST COMPANY,

Respondent.

PETITION FOR REHEARING

Comes now Sterling P. Harris, administrator of the Estate of Anna L. Harris, deceased, and respectfully petitions this Court for a rehearing of the above entitled matter. This petition is based upon the following grounds, towit:

1. That the Court erred in holding that the administrator of the estate of a deceased person in the State of Utah, does not represent the heirs of the deceased, and further in assuming that the law of the State of Utah prohibits an administrator from dealing with the real estate of the deceased or limits his power to do so.

2. The Court erred in departing from the reason assigned for the dismissal of the former certiorari proceed-

ing in holding that the question, "Whether in such circumstances a district court of the United States sitting in Bankruptcy could entertain a petition of the personal representative of the deceased farmer under Section 75 of the Bankruptcy Act," was not necessarily involved in the attack upon the decision of the Supreme Court of Utah, for the following reasons:

(a) That there is not now, and there may never be a conflict between the jurisdiction of the probate court and the jurisdiction of the federal court. The procedure in the two courts may be harmonized without the sacrifice of any rights on the part of the mortgagee.

(b) As a result of the filing of the debtor's petition in the federal court, the mortgagee has not and will not suffer such damage as would give it the right to attack the jurisdiction of the federal court, and

(c) Before nullifying the effect of a statute, the "Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Wright v. Mountain Trust Bank, 300 U. S. 440; 81 L. Ed. 736.

For the foregoing reasons, the petitioner prays that this petition for rehearing be granted.

J. D. SKEEN,
E. J. SKEEN,
Attorneys for Petitioner.

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is made and presented in good faith and not for delay.

J. D. SKEEN,
Attorney for Petitioner.

Brief in Support of Petition for Rehearing

The decision of the Supreme Court of Utah, in Sterling P. Harris, Administrator of the Estate of Anna L. Harris, deceased, v. Zion's Savings Bank and Trust Company, 99 Utah 464. 105 P. (2d) 461, does not purport to cover questions of the devolution of property and the duties and powers of the personal representative, but is confined to the negative holding that the State statutes do not expressly or impliedly authorize an administrator to file a petition in the federal court for relief under Section 75 of the Bankruptcy Act.

When this case was in this Court the first time on petition for certiorari to review the decision of the Supreme Court of Utah, it was thought proper to set out the germane portions of the probate code in order that this Court might properly construe the decision of the Supreme Court of Utah. After argument and in the dismissal of the case this Court said:

> "The decision thus rests upon an adequate non-federal ground, and as the federal question, whether in such circumstance a district court of the United States sitting in bankruptcy could entertain a petition of the personal representative of the deceased farmer under Section 75 of the Bankruptcy Act, was not necessarily involved, the Writ of Certiorari is dismissed." (313 U. S. 541; 85 L. Ed. 1509).

It was thought that the concern of this Court with the probate code was at an end and therefore questions involving the powers of the probate court in Utah were not discussed in the brief. They were not specified as issues or discussed in the district court or the circuit court of appeals or in this Court on this petition. They were referred to only in an incidental way in the oral argument. Substan-

tially all that had been claimed or admitted by either party is that under the Utah law the title to real or personal property passes to the heirs,

> "*subject to the control of the court and to the possession of any administrator appointed by the court for the purposes of administration.*" (R. S. 101-4-2).

And that is all the Supreme Court of Utah determined.

In this state of the record we assumed, from the memorandum dismissing the former writ, this Court meant in effect, that it would look to the federal law to determine whether authority was given to the administrator by section 75, to file the petition, and that the appeal would be determined on the assignments in the Circuit Court of Appeals and in this Court, and not upon questions of probate law. In other words, that the questions discussed in the minority opinion of this Court would be determinative of results.

We freely confess our misconception of the record and consequently our failure to aid the Court by bringing to it the Utah probate law, and we accept responsibility because of this failure for the misconception by the Court of the probate law. The statement of the Court is in fact wholly out of line with the Utah statutes respecting administrators which has been crystalized and settled wholly beyond controversy since Utah was organized as a territory.

The Court has said in referring to heirs: "The administrator does not represent them." This seems to be a fundamental premise upon which the Court bases its conclusion, for the Court said further,

> "If the law of a state prohibits an administrator from dealing with the real estate or conditions his power so to do, did Congress intend to override that law and confer upon this mandatory of

State power, a privilege at war with the law of his official being?"

In support of this petition we bring to the attention of the Court the probate law of Utah, set out in the appendix.

I.

THE ADMINISTRATOR UNDER THE UTAH LAW TAKES AND HOLDS EXCLUSIVE POSSESSION OF REAL AND PERSONAL PROPERTY, AND IN DOING SO REPRESENTS THE HEIRS AND ALL PERSONS INTERESTED IN THE ESTATE.

It will be seen from the statutes set out in the appendix that while the "naked" title to real and personal property passes to the heirs of the deceased, that the qualification "subject to the control of the court and to the possession of any administrator" for all practical purposes nullifies what goes before, for by section 101-4-2, appendix No. 1, the administrator must take possession. He has no discretion in the matter, appendix No. 3. By section 102-11-4, appendix No. 4, his possession by express terms is the possession of the heirs. He may maintain suits for the recovery of property, to quiet title thereto, and in all other cases, the same as the deceased might have done. He must sue to recover property. He must sue for waste, destruction or conversion of the property. Appendix Nos. 5, 6. He may continue to conduct the business of the deceased. He may compromise claims, appendix 8, and he is required to account absolutely and unconditionally for all property received or recovered. Appendix No. 9. He may not profit from the estate. Appendix 10. Suit for specific performance may be maintained against him. Appendix No. 11. He may sell stocks and bonds usually sold on a stock ex-

change and pass title without confirmation by the court. Appendix No. 12.

He may sell the real estate without order of the court, but before title passes he must have the sale confirmed.

Secs. 102-10-5 and 102-10-14, Laws of Utah, 1939. Chapter 113, Page 154.

Appendix 13. The surviving husband and wife and minor children may remain in possession of the homestead until otherwise ordered by the court and finally when all debts are paid or when there is sufficient money in the hands of the administrator to pay all debts, he may, upon petition to the court, and upon decree of distribution turn the property, real and personal, over to the heirs. Appendix No. 12.

Section 102-12-6, Appendix No. 15.

Until, therefore, the decree of distribution is made, not only does the administrator represent the heirs, but he is the exclusive representative. They cannot touch the property, and except as to the widow, they are not entitled to the possession of any part thereof. On the contrary, until the administrator makes his report to the court and procures a decree of distribution, partial or final, he is chargeable with all property which he is required to take possession of and he gets his credit only by showing disposition of the property either through sales or by delivery to heirs under order of the court. Until this is all done, he is bound on his bond and is liable to whomsoever is entitled to the property. Appendix No. 9.

The probate law of Utah is not like the probate law of Illinois and perhaps some other States. See

Buxton v. Illinois, 14 Fed. Supp. 616,

where the administrator takes possession of the real estate only upon order of the court. That case is not at all in

point, and it may be respo[illegible]e for the erroneous statement as to the law of Utah.

We may add here that in no State so far as we have been able to ascertain has an administrator more exclusive control of property than in Utah and in no other State does he more fully and exclusively represent the heirs. The statement of the court is so far at variance with the law that it can be attributed only to inadvertance. Furthermore, it is so interwoven with the decision of the court, it would seem that the error can be corrected only by granting this petition for rehearing in order that there may be a discussion of this phase of the subject preliminary to the writing of another opinion.

II.

(a). We may very appropriately call attention to a fundamental principle frequently referred to by this Court.

In Wright v. Mountain Trust Bank, 300 U. S. 440; 81 L. Ed. 736, the Court said:

> "' . . . When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'
>
> Crowell v. Benson, 285 U. S. 22, 62; 76 L. Ed. 598, 619; 52 S. Ct. 285."

In Citizens National Bank v. Commonwealth of Kentucky, for the Use and Benefit of Boyle County, et al., 217 U. S. 443; 54 L. Ed. 832, 836, where the validity of a tax was involved, the Court said:

> "As thus appli[illegible]d, the bank has neither been deprived of any [illegible]ghts nor compelled to bear any

burden in conflict with Section 5219, Rev. Stat., upon which it relies for protection. But if it be assumed — an assumption not sustained by any decision of the Kentucky court of appeals — that the 3d section is broad enough to include liability for delinquent taxes claimed from both resident and nonresident stockholders, none of the latter class are here complaining, and such an objection cannot be made by one unaffected by the alleged invalid feature. Austin v. Boston, 7 Wall. 694, 19 L. Ed. 224; Albany County v. Stanley, 105 U. S. 305, 26 L. Ed. 1044; The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.,) 205 U. S. 354, 51 L. Ed. 836, 27 Sup. Ct. Rep. 509."

In Iroquois Transp. Co. v. De Laney Forge & I. Co., 205 U. S. 354; 51 L. Ed. 836,

the Court referred to an argument assuming a conflict between a State and Federal statute, and said:

"But no such supposed embarrassment has yet occurred, and they are as yet imaginary. . . . There is no difficulty other than such as may happen in case one court should take and have possession of the vessel at a time when the other should require it; but that is an incident common along all lines of concurrent proceedings in the State and Federal courts, and gives no ground for the denial of jurisdiction to either."

(b). The Bank is entitled to its money or to the value of its security if less than the debt, and it has no constitutional claim to anything in addition thereto.

"And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor

and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (John Hancock Mut. L. Ins. Co. v. Bartels, supra; Kalb v. Feuerstein, 308 U. S. 433, 84 L. Ed. 370, 60 S. Ct. 343, 41 Am. Bankr Rep. (NS) 501 supra), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

Wright v. Union Central Life Insurance Co., 311 U. S. 273, 85 L. Ed. 184.

The statute protects that right. This Court said so in

Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al, 300 U. S. 440, 81 L. Ed. 736,

and if this Court had not said so and adhered to that rule, the proceeding would not now be before the Court. The most that can be claimed by the creditor is that the consummation of the mortgage foreclosure has been postponed; but that is not sufficient to justify a narrow construction of the statute which eliminates all estates from its protection. Certainly the rights of the estates are being frittered away, and in fact, absolutely destroyed by the technical construction insisted upon by the Bank. The reasoning of the Court is not only based upon a premise contrary to the laws of the State of Utah, but the conclusions are not in harmony with the conclusions heretofore reached by this Court in

Wright v. Union Cent. L. Ins. Co., supra;

John Hancock Mut. L. Ins. Co. v. Bartels, 308 U. S. 180;

Kalb v. Feuerstein, 308 U. S. 433;

Borchard v. California Bank, 310 U. S 311, and others.

And now, after years of expensive litigation, doubts as to the constitutionality of this phase of the statute have

been raised and the clear language of the statute qualified to the extent that we are back where the Court left us in

Louisville v. Radford, 295 U.S. 555, 79 L.Ed. 1593

Why should this conclusion be reached in this case if the Bank is not harmed, and measured by the yardstick used in Wright v. Vinton Branch, 300 U. S. 440, 81 L. Ed. 736 it is not; and if there are no conflicting orders between the State court and the Federal court, and there are none, because no orders have been made. It is true, the Supreme Court of Utah said:

> "Neither the administrator nor the probate court has any power express or implied to permit one to carry the estate out of the power of the probate court or the latter to divest itself of jurisdiction and permit the estate and its officer to become subject to another tribunal from which neither may be reclaimed." (99 Utah, 464).

But was the Supreme Court of Utah justified in assuming that even though it had jurisdiction, that Section 75 permitted the dissipation of the estate; or that the Federal court would not respond to a direct request of the probate court that a federal court proceeding be brought to an end in the interest of creditors or heirs if prejudice was being suffered.

The decisions of this Court are to the effect that creditors are not prejudiced by the administration of property under the statute, and the Utah Court cannot assume that the federal district court would not do its duty and that therefore a conflict might, at some future time, arise. Such an imaginary conflict does not justify the practical denial of rights under the federal statute. It will be time to decide whether the constitutional power of Congress to enact uniform statutes upon the subject of bankruptcy is to be restricted, when such a controversy arises.

We conclude that a rehearing should be granted:

1. Because this Court has inadvertantly misconstrued the law of Utah applicable to estates of deceased persons on a matter which may have far-reaching and prejudicial effects, and which has lead to erroneous conclusions in this case.

2. That the administrator had the clear statutory right to file a petition for relief under
   Section 75 of the Bankruptcy Act
   to have the petition entertained, and to make available for the estate the benefits of the law.

3. That the proceeding under Section 75 should continue until interrupted or terminated by a proper order made by the Federal Court pursuant to the statute, and after request of the probate court.

4. That neither the secured creditor nor any heir has the right to challenge the jurisdiction of the Court upon the question of the conflict between the probate statutes of the State of Utah, and Section 75, until it is shown that it has been damaged or prejudiced through the operation of the statute; and no such a showing has been made in this case.

5. That questions of construction of Section 75 (r) as applied to estates, and more specifically whether its application should be restricted or limited, cannot be brought before the Court until there is in fact a conflict between orders made by the Federal and State courts.

Respectfully Submitted.

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Attorneys for Petitioner.

APPENDIX

The following references are to sections in the Revised Statutes of Utah, 1933:

1. Section 101-4-2: Property of Intestate Passes to Heirs, Subject to Probate Proceedings.

   "The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purposes of administration."

2. Section 102-12-8: Decree — Rights of Distributees.

   "In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for and recover their respective shares from the executor or administrator or any person having the same in possession."

3. Section 102-11-3: Right to Possession of Property — Actions to Recover.

   "The executor or administrator is entitled to, and must take possession of, all the real and personal estate of the decedent, and shall receive the rents and profits of the real estate until the estate is settled or delivered over by order of the court to the heirs or devisees; and must keep in good tertantable repair all houses, buildings and fixtures thereon which are under his control, and collect all debts due to the decedent and to the estate. The heirs or devisees may alone, or jointly with the executor or administrator, maintain an action for the possession of the real estate or

for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as to require them so to do."

4. Section 102-11-4: Possession of Representative Possession of Heirs and Devisees.

"For the purpose of bringing suits to quiet title, or for partition of the estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this title."

5. Section 102-11-5: Actions By or Against Representatives For Recovery of Property.

"Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates."

6. Section 102-11-6. Actions for Waste, Trespass, Conversion.

"Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testators or intestate in his lifetime. They may also maintain actions for trespass committed on real estate of the decedent in his lifetime."

7. Section 102-11-8: Continuing Decedent's Business.

"When the interests of creditors are not prejudiced thereby, the court may prescribe that the business in which the decedent was engaged at the time of his death may be continued for such length of time as may be necessary to permit the affairs of the estate to be wound up to the best advantage."

8. Section 102-11-12: Compromising With Debtors.

"Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approval of the court or judge, may compound with him and give a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the best interests of the estate."

9. Section 102-11-20: Representative Charged With Whole of Estate.

"'Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profits and income of the estate."

10. Section 102-11-21: Not to Profit or Suffer Loss on Account Of.

"That the personal representative shall not make profit by the increase, nor suffer loss by the decrease or destruction without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made."

11. Section 102-11-26: Specific Performance of Decedent's Contracts.

"When a person, who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignment, transfer or delivery; and in all cases when such decedent, if living, might be compelled to make such conveyance, assignment, transfer or delivery, the court may make a decree authorizing and directing his executor or administrator to convey such real estate, or to assign, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto."

12. Section 102-10-11: Sale of Stocks, Bonds, Etc.

"In the case of sales of stocks, bonds or other choses in action likely to fluctuate in value and that are regularly sold and purchased on any stock exchange sanctioned by the securities commission, or other like institution, when sold by the executor or administrator upon such stock exchange or other like institution no confirmation thereof by the court shall be necessary before title passes; but title to property thus sold shall pass upon and by virtue of such sale."

13. Section 102-10-5, Chapter 113, Laws of Utah, 1939. Sales—Report and Confirmation.

"The executor or administrator may sell any property of the estate without order of the court, at either public or private sale and with or without notice as he may determine, but must make return of such sales in all cases; and if directions are

given in the will as to the mode of selling, or the particular property to be sold, such direction must be observed. In any case, no title passes unless the sale is confirmed by the court."

14. Section 102-10-14, Chapter 113, Laws of Utah, 1939: Petition for Order Confirming Sale of Real Estate.

"To obtain an order confirming the sale of real property the executor or administrator must present a verified petition to the court setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof; and, if said order confirming the sale of real estate is petitioned for on the ground that it is for the advantage, benefit and best interests of the estate and those interested therein that the sale be confirmed, the petition, in addition to the foregoing facts must set forth in what way an advantage or benefit would accrue to the estate and those interested therein by such sale. If the executor or administrator neglects to apply for an order confirming said sale where it is necessary, any person interested may make application therefor."

15. Section 102-12-6: Final Distribution— Settlement of Accounts — Petition — Notice.

"When all debts are paid, or sooner if before that time all the property of the estate has been sold or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate is in proper condition to be closed, the executor or administrator must render a final account and pray for settlement of his administration. Such petition shall contain the names and addresses of the heirs, devisees or other persons entitled to participate in such distribution, according to the best knowledge, information and belief of the executor or administrator. The clerk shall file the petition, and the court or clerk shall fix the date of hearing thereon, notice of which shall be given."

SUPREME COURT OF THE UNITED STATES.

No. 268.—October Term, 1942.

Sterling P. Harris, Administrator of the Estate of Anna L. Harris, Deceased, Debtor, Petitioner, *vs.* Zion Savings Bank and Trust Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[January 11, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

December 20, 1937, Anna L. Harris filed her petition for relief under § 75 of the Bankruptcy Act[1] in the District Court for Utah. She made an offer of composition and, while this offer was pending, she died. January 16, 1939, the bankruptcy court ordered the proceeding abated because of her death. March 30, 1939, the petitioner was appointed administrator of her estate.

Thereafter the respondent instituted a foreclosure proceeding upon a mortgage on real estate of the decedent, obtained a judgment, and, August 15, 1939, purchased the mortgaged premises at foreclosure sale and received a sheriff's certificate.

February 13, 1940, two days before the period of redemption expired, the petitioner, as administrator, secured leave from the probate court to apply, as the decedent's personal representative, for an order reviving the debtor proceedings. The probate court's decree was stayed pending an appeal to the Supreme Court of Utah. Notwithstanding the stay, the petitioner applied to the bankruptcy court for a revivor.

The Utah Supreme Court reversed the decree of the probate court, holding that, under the probate code, the court had no authority to authorize the administrator to petition the federal court under § 75.[2] This court granted certiorari to review the judgment[3] but, after hearing, dismissed the writ on the ground that the decision rested on an adequate non-federal ground.[4]

[1] 11 U. S. C. § 203.

[2] In re Harris' Estate, 99 Utah 464, 105 P. 2d 461.

[3] 312 U. S. 670.

[4] Harris v. Zion Savings Bank & Trust Co., 313 U. S. 541.

Pending hearing in this court, the petitioner, on September 18, 1940, lodged with the clerk of the bankruptcy court an amended petition to be adjudged a bankrupt under subsection (s) of § 75. The court ordered that the paper be not filed and also ordered that the petitioner show cause why his revivor petition should not be dismissed. August 29, 1941, the respondent moved to strike both the original and amended petition. September 30, 1941, the district judge entered an order dismissing the administrator's petition to revive and rejecting the amended petition.

October 10, 1941, the petitioner sought leave of the probate court to appeal from the bankruptcy court's order of dismissal and rejection. The prayer was denied, and the court held that the petitioner should not be authorized to appeal. The petitioner, nevertheless, appealed to the Circuit Court of Appeals, which affirmed the District Court's action.[5]

Subsection (c) of § 75 provides: . . . "A petition may be filed by any farmer" . . . for the extension and composition of his debts. Subsection (r) declares: "For the purpose of this section . . . the term 'farmer' includes the personal representative of a deceased farmer;" . . .

The question is whether an administrator may, in his representative capacity, initiate such proceedings without leave of the court which appointed him and has jurisdiction over him, or may do so where, as here, he has applied for leave and been denied it. The importance of this question, and a diversity of views amongst the federal courts,[6] led us to grant certiorari.

Put another way, the question is,—if the law of a state prohibits an administrator from dealing with the real estate, or conditions his power so to do, did Congress intend to override that law and confer upon this mandatory of state power a privilege at war with the law of his official being? We must meet that question in this case, for the Supreme Court of Utah has told us that, under the law of that State, the petitioner has no such power. If such he possesses, it derives from a law which overrides the law of the petitioner's official creation.

Laying aside any issue of constitutional power, the question remains whether Congress intended so to override the law of a

[5] 127 F. 2d 1012.

[6] Compare In re Buxton's Estate, 14 F. Supp. 616; In re Reynolds, 21 F. Supp. 369; Lamm v. Northern California National Bank, 93 F. 2d 709; Hines v. Farkas, 109 F. 2d 289.

state and confer on the state's appointee, as *persona designata*, a function to be exercised not for the deceased farmer, not for the decedents' estate, the entity he represents under state law, not for the heirs who inherit the realty, but in a vacuum?

When we reflect that the settlement and distribution of decedents' estates, and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction of § 75 consistent with these principles. We think the beneficent purpose of the legislation will not be defeated by such a construction.

The section is a manifestation of the enlarged conception of the bankruptcy power as extending not alone to a seizure of an insolvent debtor's assets in the interest of an impartial application of them to his creditor's demands, but also as a means of relieving his distress and rehabilitating him financially while rendering his creditors all for which they may reasonably hope.[7]

So the opportunity of resort to § 75 enures not to creditors but to the debtor. His voluntary action, not theirs, determines whether the law shall be invoked. Congress extended him a privilege which he could exercise or renounce. By the provision that the term "farmer" should include a personal representative, Congress extended that privilege to an administrator. But, clearly, if that functionary elects not to avail himself of the privilege, the section is, as to him, inoperative. Moreover, if his election depends, under the law of his being, not alone on his choice but upon the exercise of the choice of his master, the state which gave him official life, and under whose tutelage he is, then the door of the bankruptcy court is open to him only when that choice has been exercised in the only way he can exercise it.

In this view Congress has extended the benefits of the act only to administrators who can lawfully elect to avail of them. Thus conflict between federal and state power is avoided and the two are accommodated.

The opinion of the Supreme Court of Utah points out some of the many inconsistencies and difficulties an opposite conclusion

[7] Local Loan Co. *v.* Hunt, 292 U. S. 234, 244; Continental Illinois Natl. Bank & T. Co. *v.* Chicago, R. I. & P. Ry. Co., 294 U. S. 648, 667-675; United States *v.* Bekins, 304 U. S. 27, 47; Wright *v.* Union Central L. I. Co., 304 U. S. 502, 514; Wright *v.* Union Central L. I. Co., 311 U. S. 273, 279.

would entail. Under the law of the State realty descends directly to the heirs. The administrator does not represent them. In resorting to § 75 he may, or may not, be acting in their true interests. The law of the State demands the speedy settlement of the estate. If independently of that law the administrator may apply under § 75, it may well happen that this state policy will be nullified. In other states an administrator may succeed to the realty absolutely or in such measure and for such purpose that no state policy would be contravened by resort to § 75. But, in any case, the interests of those entitled to inherit ought to be considered before choice of action is determined. The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate.

We cannot accept the view that § 8 of the Bankruptcy Act[8] governs. That provision was part of the Act of 1898 and looked only to proceedings wherein title to the assets was transferred from the bankrupt as of the date of petition and vested in a trustee, and wherein the assets were to be liquidated promptly and the proceeds distributed amongst creditors. In other words the purpose and effect of the proceeding in bankruptcy and that in the probate court were the same. Under § 75 they are or may be at war, the one preventing the liquidation which is the chief aim of the other. In other respects § 8 is inapplicable. Why, in a case like this, should the heirs, the owners of the equity in real estate, be made parties against their will?[9]

Congress, when the matter has come to its attention, has expressly recognized that if a moratorium proceeding such as this is to be brought or revived by an administrator he ought to obtain leave from the probate court. So § 74, as amended, provides.[10] We think the same intent should be implied as to § 75.

We believe that it was with these considerations in mind that this court adopted Order 50(9) of the General Orders in Bankruptcy.[11] That order provides that the personal representative of a farmer shall annex to his petition filed under § 75, amongst other things, a copy of the order of the probate court authorizing him to file the petition. The court below thought the General Order

[8] 11 U. S. C. § 26.

[9] See Shute v. Patterson, 147 Fed. 509.

[10] 11 U. S. C. § 202.

[11] General Orders in Bankruptcy of January 16, 1939, 305 U. S. 681, 11 U. S. C. A. following § 53.

applicable and felt bound to apply it. It is suggested that this portion of the Order is void as running counter to the clear mandate of the statute. And so it would be if the Act conferred upon the administrator the right, notwithstanding state law, to invoke the bankruptcy powers. But the rule comports with what we have endeavored to show is the natural and reasonable construction of § 75. If the state law permits resort to the remedy afforded by the section, no difficulty will be created by requiring the obtaining of such an order. If it forbids, then no conflict between the policies of state and nation will arise.

The judgment is affirmed.

Mr. Justice DOUGLAS, dissenting.

Sec. 75(r) includes "the personal representative of a deceased farmer" within the definition of "farmer" as that term is used in the Act. Sec. 75(n) provides that in these proceedings "the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer . . . shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt" was filed. Since that provision relates to the "jurisdiction and powers" of the bankruptcy court as well as to the "rights and liabilities" of creditors and "of all persons" with respect to the property, I do not see how we can escape the conclusion that it incorporates § 8 of the Bankruptcy Act. Practically identical provisions in old § 74(m), dealing with compositions and extensions, were held to have that effect. *In re Morgan*, 15 F. Supp. 52. Cf. *Benitez* v. *Anciani*, 127 F. 2d 121. The function and purpose of § 74 and § 75 are comparable. No reason is apparent why a different result should obtain under § 75. Sec. 8 of the Bankruptcy Act states that death of a bankrupt "shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died". That section "makes no exception or qualification—

after the proceedings have been commenced they are not to be abated by death." *Hull* v. *Dicks*, 235 U. S. 584, 588. It has long been considered mandatory. *Shute* v. *Patterson*, 147 Fed. 509; 1 Collier, Bankruptcy (14th ed.) § 8.02. On death of a bankrupt where his personal representative succeeds to the personalty and his heirs to the realty, the proper procedure is to make them parties. *Shute* v. *Patterson*, *supra*, p. 512; *Benitez* v. *Anciani*, *supra*, p. 125. And see *In re Schwab*, 83 F. 2d 526. And the death of a bankrupt does not prevent his discharge (Collier, *loc. cit.*) at the instance of the administrator. *In re Agnew*, 225 Fed. 650.

If this had been an ordinary bankruptcy case there can be no doubt that the personal representative of this decedent would have been entitled to come in, that the heirs could have been joined, and that a discharge could have been obtained provided the requirements of § 14 were met. The fact that the proceeding is under § 75 should not make a difference. Congress has specifically stated that a "personal representative" of a farmer may employ the machinery of § 75. The offer of composition made by the decedent before her death might or might not have been accepted. But even though it were rejected, subsection (s) affords an alternative form of relief, one benefit of which is a discharge. § 75(s)(3); *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273. I think it clear that § 75 was designed to afford to the estate the opportunity to obtain these benefits. Those benefits may be just as considerable as they would be in ordinary bankruptcy. The fact that the heirs would be held at bay is no more significant in this instance than it is in other applications of § 8 of the Bankruptcy Act. To be sure, title to the property vests in the trustee in ordinary bankruptcy. But that circumstance has no relevancy to the scope of the jurisdiction of the bankruptcy court under § 75 which is in issue here and which we recently stated was "exclusive", carrying with it "complete and self-executing statutory exclusion of all other courts.". *Kalb* v. *Feuerstein*, 308 U. S. 433, 443. Furthermore, Congress has not made participation of the personal representative dependent on authorization from the state probate court. Under old § 74 it did. Thus § 74 as amended by the Act of June 7, 1934 (48 Stat. 922, 11 U. S. C. 202a), an Act which also contained certain amendments to § 75 (48 Stat. 924, 925), included "the personal representative of a deceased individual for the purposes of effecting settlement or composition with the creditors of the estate:

Provided, however, That such personal representative shall first obtain the consent and authority of the court which has assumed jurisdiction of said estate, to invoke the relief provided" by that Act. No such qualification appears in § 75. Its absence there and its presence in § 74 clearly indicate that where Congress wished to curtail the power of bankruptcy courts over estates of decedents and to make the participation of a personal representative dependent on authorization from the state probate court, it said so. The view I urge would of course result in a collision between the Bankruptcy Act and state probate law. But that is no more important here than was the collision in *Kalb* v. *Feuerstein, supra.* In this case, as in other situations (*In re Devlin,* 180 Fed. 170, 172) it is the bankruptcy act not local probate law which must control the administration of the estate. The bankruptcy power is supreme. Sec. 8 is a valid exercise of that power. The result is that General Order 50(9) must give way insofar as it is inconsistent with this result. For those rules are intended merely "to execute the act" (*West Co.* v. *Lea,* 174 U. S. 590, 599) not to "authorize additions to its substantive provisions." *Meek* v. *Centre County Banking* Co., 268 U. S. 426, 434.

Mr. Justice BLACK and Mr. Justice MURPHY join in this dissent.